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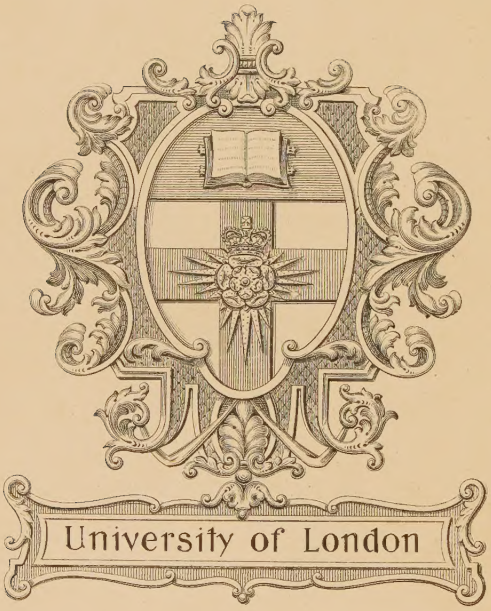

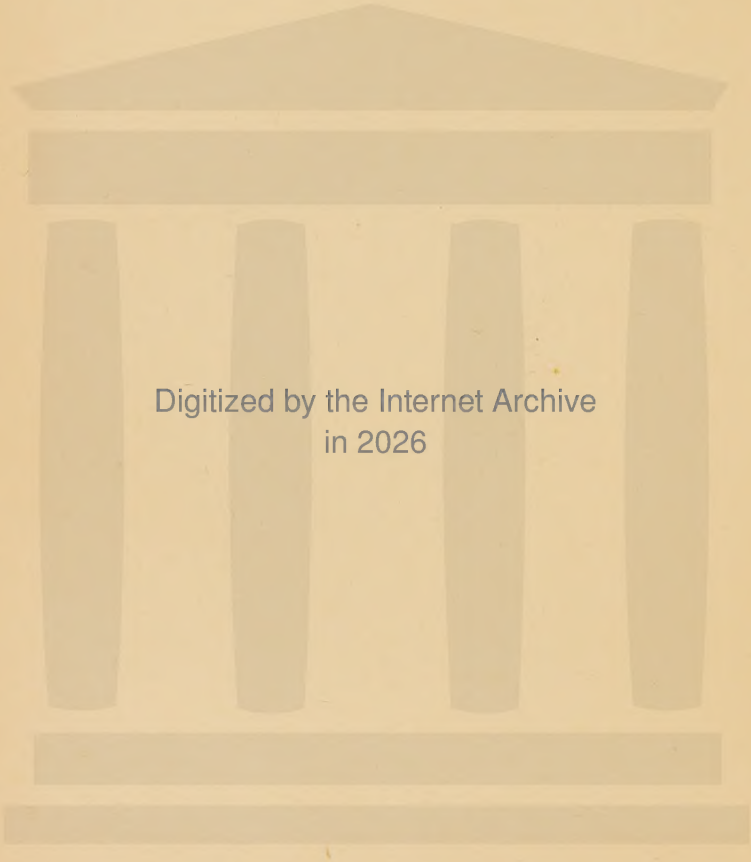

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CASES

DETERMINED BY THE

PROBATE, DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS.

B. *v.* B. AND G.

1936

July 22.

Divorce—Practice—Pleading—Prayer in Petition for exercise of discretion of Court in favour of guilty petitioner—Cross-claim by respondent for divorce—Particulars of cross-claim.

The respondent to a divorce petition, the prayer of which asks for the discretion of the Court to be exercised in favour of the petitioner, is not entitled in pleading to treat this prayer as an admission by the petitioner of his own adultery and as justifying thereby a cross-claim for dissolution of marriage on the ground of that adultery without giving any further particulars of the same. It is immaterial that the petitioner must be aware of the facts and may have lodged his statement of them along with his application for the Registrar's certificate that the case is ready for trial.

Semble: this practice is still correct notwithstanding the dictum in *Bevis* v. *Bevis* [1935] P. 86, 97, that the prayer of a petition, by including the prayer for the exercise of the discretion, is notice to the respondent that the petitioner has been guilty of adultery.

HUSBAND'S PETITION for divorce. The prayer of the petitioner asked for the exercise of the discretion of the Court

1936

B. *v.* B. AND G.

in his favour, but no discretion statement had yet been filed and there was no allegation in the body of the petition of the petitioner's own adultery. By their answers both the respondent and the co-respondent denied the charges and the respondent further alleged that the petitioner had committed adultery. She prayed by a cross-prayer that the prayer of the petition might be rejected and that the marriage might be dissolved at her instance. She delivered particulars of the adultery of the husband alleged by her as follows: "The respondent relies on the fact that the petitioner has asked that your Lordship will exercise your discretion in his favour. Beyond this she is unable to give any particulars of the petitioner's adultery." The petitioner took out a Registrar's summons asking that the allegation in the answer of the petitioner's adultery and the cross-prayer should be struck out. The Registrar made an order in the terms of the summons. The respondent appealed from the Registrar's order.

C. L. Beddington for the respondent. The petitioner has given notice that he has committed adultery by his prayer for the exercise of the discretion of the Court in his favour: *Bevis* v. *Bevis*. (1) The respondent, however, has no concern with the discretion statement, which is for the use of the Court, and, unless by direction of the judge, is not allowed to inspect it (Matrimonial Causes Rules, 1924, r. 30 (C) (2.), which came into operation on January 1, 1935). On the face of the rule adultery is the only matrimonial offence bound to be disclosed in a discretion statement and subject to this limitation as to inspection: *Kirk* v. *Kirk and Gundy*. (2) As to other discretionary bars, they must be disclosed to the Court at the hearing as material facts. The rule makes it plain that the prayer for the exercise of the discretion is notice of the adultery of the petitioner: *Bevis* v. *Bevis*. (1) Further it is such notice as justifies the respondent in alleging that adultery and the petitioner cannot complain of the absence of better particulars, because the respondent has given

(1) [1935] P. 86.

(2) (1934) 50 Times L. R. 237; [1934] W. N. 31.

notice that she can, and at the hearing will, solely rely upon the discretion statement. At the hearing the petitioner will give evidence in support of his case for the exercise of discretion and I can then make my case.

P. B. Morle for the petitioner. This appeal raises a question of pleading. In *Bevis* v. *Bevis* (1) the question turned only on evidence, and on a rule of practice not now in operation. On the present point the test applicable is whether the answer is in such a form as would have been allowable had the present respondent filed a separate petition seeking relief on the ground of the adultery of the present petitioner. If that issue had gone to trial, could the respondent succeed in this state of the pleadings and particulars? The mere suggestion of the petitioner's adultery by the prayer of his petition is not a confession by him. Even if it were, it is too ambiguous to claim a decree upon it. This would be the position at the hearing if the petitioner withdrew his petition. The respondent could not obtain a decree. In *Bevis* v. *Bevis* (1), relied on against me, the observations of Maugham L.J. were obiter and did not apply to the position now contended for, i.e., the sufficiency of the cross-prayer standing by itself, and, moreover, a discretion statement was actually upon the file. If the procedure contended for were correct the respondent would have to rely upon the statement of the petitioner being a candid one. The new rule negatives such a procedure. (2)

Beddington in reply. I ask that my cross charge should stand till the petitioner goes into the witness-box at the hearing.

LANGTON J. [having stated the nature of the appeal, continued:] It is important, I think, to bear in mind that this is a question of pleading, and pleading only. It does not concern the rights of the parties, nor does it really concern the question which was canvassed in the case of *Bevis* v. *Bevis* (1)—namely, the question of admissibility of

(1) [1935] P. 86.

(2) See the New Rule (30 C) set out [1935] P. at p. 99.

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B. v. B. AND G.

Langton J.

evidence after publication to the respondent of the petitioner's discretion statement. I am bound to admit that I have great difficulty in this case by reason of a dictum that fell from Maugham L.J. in that case. In *Bevis* v. *Bevis* (1), which, as I say, did not deal with pleading, but dealt with admissibility of evidence, Maugham L.J. said (2): "It may be observed that the petitioner, the husband, in the previous proceedings, according to the usual practice, stated in his petition that he would ask for the exercise of the discretion of the Court in his favour, which was notice that he had been guilty of adultery, and was notice to the wife that, complying with the direction, he had filed or lodged with the application for the Registrar's certificate, a statement of the matters in respect whereof the exercise of the discretion was prayed." That statement gives me great pause in dealing with the matter at issue in the present case, because, as it stands, it certainly seems to be a very helpful pronouncement towards the argument of counsel for the respondent that a prayer for discretion is notice that the petitioner has committed adultery. Speaking for myself, and without that guidance of Maugham L.J., I should be inclined to doubt whether it was notice of anything more than the words actually stated—namely, that the discretion of the Court would be requested in this particular case; but I cannot shut my eyes to the fact that the Lord Justice says that it is something more, namely, notice that the petitioner has been guilty of adultery. I must take the law as I find it, but, on the other hand, it would not be right, of course, to press a dictum of this kind too far, and, as counsel has pointed out, the Court was not in that case addressing its mind to any question of pleading at all. It was dealing with the admissibility of evidence in a particular case, which was a case heard and tried under the rules, which are not the rules in force to-day. Counsel for the petitioner points out that this statement, if it were to be taken as applicable to that particular case, might have one meaning, and that it would be unfair to give it another when applying it outside

(1) [1935] P. 86. (2) Ibid. 97.

the facts of that particular case. Looking at the whole of the matter and reminding myself of the present new rules, which are conveniently set out in the report of *Bevis* v. *Bevis* (1), I think that is the proper view to take. I should be loth to subscribe to the suggestion that what the Lord Justice then said was obiter. That would almost seem to suggest that he was saying something which was not germane to the point. I do not think that it was obiter to that particular decision. I think that the real distinction is the other distinction, pointed out by counsel, that he was not dealing with matters under the present rules. Apart from that dictum of Maugham L.J. I should have, I think, very little difficulty in this case. The old rules of pleading are well settled and never better stated, I think, than in Dr. Blake Odgers' well known book on Pleading and Practice. Taking a statement from the 11th ed. at pp. 130 and 131, dealing with charges of misconduct, the rule is there stated with particularity and is specially noted where a pleading contains an imputation upon the character of an opponent. He goes on to say, at p. 131: "It is no excuse for the omission of such details that the opponent must already be perfectly well aware of the facts." Counsel reinforced that by applying the test which I think may very fairly be applied to this class of matter: Can the allegation stand on its own feet independently of an allegation to be found in the petition, or, as it might be in the King's Bench Division or Chancery Division, the statement of claim? I think that is quite a fair test to apply. Applying that test, it is clear that this allegation cannot stand for a moment without the support that it obtains from the original petition. It is argued, and I think again fairly, that this is in the nature of a cross-petition and counterclaim, and it is therefore right to test it, not merely as an answer in defence, but really as a matter of fact. If one were to assume that the petition was by leave discontinued to-morrow, it is clear that this allegation and this attack would fall immediately to the ground. Therefore, treating the matter as a mere question

(1) [1935] P. at p. 99.

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of pleading, upon the well known rules of pleading it seems to me that this appeal must fail, and that the Registrar was right in saying that it cannot stand, for want of particularity.

A further point was made by counsel for the petitioner which seemed to me to have weight and substance. I only feel a doubt concerning it because it introduces again the relation between the Court and the petitioner asking for the discretion, as to which I have been left in uncertainty by the decision of the Court of Appeal in *Bevis* v. *Bevis*. (1) He says that if this allegation were allowed to stand, the petitioner would be placed in the greatest possible difficulty in pleading to it. He must either admit it and thereby make a confession, which at present does not exist and which it certainly seems the rules are clearly designed to avoid, or he must deny it and stultify his own prayer for discretion. It certainly appears to me that if the allegation were allowed to stand, he would be forced to do something which the rules, as enshrined in the practice, clearly seek to avoid, and his action must give the respondent an advantage by reason of the petitioner's frankness to the Court. I feel, as I say, some diffidence in approving this argument as a whole, because I am not sure that that kind of argument would find any favour in the Court of Appeal. I am not sure that that is not just the kind of argument by which I was misled, according to the majority of the Court of Appeal, in the case of *Bevis* v. *Bevis* (1), and I want it to be understood that I am basing my judgment upon the rules of pleading in dealing with this matter of pleading, and not upon what may be a wrong or obscure notion as regards the relation between this Court and the parties who come to seek the assistance of this Court.

The appeal therefore fails.

Solicitors for the wife : *Braund & Hill.*

Solicitors for the husband : *Croft & Mortimer.*

(1) [1935] P. 86.

R. M. M.

Distinguished. GUNNER *v.* GUNNER AND STIRLING. [1948] 2 All E.R. 771.

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July 6, 8, 30.

Divorce—Post-nuptial settlement—Variation—Purchase by spouse of annuity payable to other spouse—Absolute gift of annuity—Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 192.

During coverture the petitioning wife purchased from an Insurance Company an annuity to be paid to the respondent husband. The company executed a deed by which they agreed with the petitioner and the respondent to pay the annuity to the respondent. On the dissolution of the marriage on the ground of the adultery of the respondent, the petitioner presented a petition for variation of the annuity deed as a post-nuptial settlement. The answer of the respondent set up that the annuity was an absolute gift by the petitioner and that no settlement had been created:—

Held, that when the petitioner paid the consideration money for the purchase of the annuity she parted with the plenum dominium over the property transferred, that an absolute gift of the annuity was made to the respondent and there was no settlement.

PETITION by Ellen Brown, the wife petitioner for divorce for variation of a post-nuptial settlement.

The marriage took place on September 11, 1933. On September 15, 1933, the petitioner executed what she now claimed to be a post-nuptial settlement. In pursuance of an oral agreement, the petitioner signed a form containing a proposal to the Prudential Assurance Company that in consideration of payment by her of 2097*l.* 10*s.* 2*d.* the company should pay to the respondent husband, Harold Brown, for his life an annuity of 104*l.* On September 22, 1933, the petitioner paid the purchase-money to the company, and on the same date the company executed a deed whereby the company agreed both with the petitioner and the respondent to pay to the respondent or his assigns an annuity of 104*l.* The petitioner executed no further document. There was no issue of the marriage, and on February 19, 1935, at the Winchester Assizes, a decree nisi was pronounced dissolving the marriage by reason of the adultery of the husband. A few days later the respondent mortgaged his interest in the annuity to a third party, who had thereafter been in receipt

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of the annuity. The decree nisi was made absolute on August 28, 1935, and on September 9, 1935, the petitioner presented her petition for variation of settlement by which she undertook should the Court accede to her prayer for variation to redeem the mortgage and indemnify the mortgagee, and prayed that the interest of the respondent in the annuity should be extinguished, so that the petitioner might receive the same for the remainder of the life of the respondent. Shortly stated, the answer of the respondent to the petition was that the annuity purchased was an absolute gift to him by the petitioner and that there had been no suggestion of a settlement.

The Registrar to whom the petition was referred in due course reported that the transaction did not constitute a settlement capable of variation within the statute, the Judicature (Consolidation) Act, 1925, s. 192.

The petitioner gave notice of motion to vary this report and for a declaration that the annuity deed constituted a settlement capable of variation in the terms of the petitioner's prayer.

Noel Middleton K.C. (*J. F. Compton Miller* with him) for the petitioner. In *Bosworthick* v. *Bosworthick* (1) it was held by the Court of Appeal that an annuity secured by a bond could be treated as a settlement for the purpose of the section. This decision followed that of the Court of Appeal in *Dormer* v. *Ward*. (2) If an annuity secured by a bond can be regarded as a settlement, the case where it is secured by deed, as in the present, is a fortiori. This case moreover satisfies the definition of a settlement given by Hill J. in *Prinsep* v. *Prinsep*. (3) The learned judge there insisted that the criterion was whether the instrument, whatever its form, provided for the benefit of one or other or both of the spouses as spouses and with reference to their married state. That is the case here. The same criterion is laid down as applicable as early as the case of *Worsley* v.

(1) [1926] P. 159; [1927] P. 64, 72, C. A.

(2) [1901] P. 20.

(3) [1929] P. 225, 232.

Worsley and Wignall (1), where the Court dealt with the question whether a separation deed could be varied as a post-nuptial settlement. In *Melvill* v. *Melvill and Woodward* (2) the Court of Appeal, reversing a decision of Bateson J., held that a settlement made by a guilty wife pending proceedings for divorce was a post-nuptial settlement capable of variation, as it was made by one of the parties to a then still existing marriage on the children of that marriage. It is there pointed out that the motive of a settlor is immaterial. The question whether there is a settlement or not must be decided by the instrument itself: *Melvill* v. *Melvill.* (2) [He also referred to *Nepean* v. *Nepean* (3); *Gulbenkian* v. *Gulbenkian* (4) (a case of the settlement of life policy moneys; and *Cooper* v. *Cooper* (5) (reduction of the allowance under a separation deed).]

J. Norman Daynes K.C. (*F. L. C. Hodson* with him) for the respondent. The creation of the annuity for the respondent was a gift to him, not a settlement. In the case of *In re Brunning. Gammon* v. *Dale* (6) Neville J., in dealing with the legacy of an annuity, was of the opinion that the annuitant was at liberty to say "Give me the sum that will purchase the annuity from now onwards" and was entitled to the capital value of the annuity as at the date of the last instalment received. This is quite inconsistent with the suggestion that any result at all approaching to a settlement arises from what has happened in this case. The question is whether the annuity is a gift or a resulting trust. This distinction was pointed out in *Standing* v. *Bowring* (7) in the Court of Appeal. That case follows the same line of reasoning as *In re Brunning. Gammon* v. *Dale* (6), and Cotton L.J. said: "The rule is well settled that where there is a transfer by a person into his own name jointly with that of a person who is not his child or his adopted child then there is prima facie a resulting trust for the transferor.

(1) (1869) L. R. 1 P. & M. 648.
(2) [1930] P. 99, 159.
(3) [1925] P. 97.
(4) [1927] P. 237.
(5) [1932] P. 75.
(6) [1909] 1 Ch. 276, 279.
(7) (1885) 31 Ch. Div. 282, 287.

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But that is a presumption capable of being rebutted by showing that at the time the transferor intended a benefit to the transferee." The result is that the intention at the time settles the question whether or not it is intended to make a gift. If a gift is intended there can be no resulting trust which must arise if at all ab initio. *Worsley* v. *Worsley and Wignall* (1) is distinguishable, no question of the contra-distinction of a " gift " arose. The same observation applies to *Dormer* v. *Ward* (2) ; *Nepean* v. *Nepean* (3) ; and *Prinsep* v. *Prinsep*. (4)

In *Hubbard* v. *Hubbard* (5) an absolute assignment of a leasehold house and furniture to a wife was held not to be a settlement. In the same case the Court of Appeal approved a similar decision of Sir F. Jeune in *Chalmers* v. *Chalmers* (6) in the case of an assignment by a wife to a husband.

With reference to the prayer of the petition, the Court cannot affect the contract entered into by the company in their absence and without their being heard.

Noel Middleton in reply. *In re Brunning. Gammon* v. *Dale* (7) is distinguishable. This annuity cannot be said to have been the subject of an unqualified gift as in that case, and in that case the disposition, being by will, is subject to different considerations. The respondent never had complete dominion over the price paid. He could at no time have parted with the whole of it. The company must be taken to have deducted the amount of their profit on the transaction. What the respondent has mortgaged is not equivalent to the sum that my client paid to the company, which was the settled property. There was no original gift of the price of the annuity. What has been provided here is a provision for the husband as husband by way of periodical payments.

Cur. adv. vult.

(1) L. R. 1 P. & M. 648.
(2) [1901] P. 20.
(3) [1925] P. 97.
(4) [1929] P. 225
(5) [1901] P. 157.
(6) (1892) 68 L. T. 28.
(7) [1909] 1 Ch. 276.

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1936. July 30. LANGTON J. This motion has been admirably argued, and it is no fault of the counsel engaged that I have experienced the greatest difficulty in reaching a determination of the issue.

The point in dispute can be succinctly stated. On September 11, 1933, the petitioner, then Miss Ellen Siddall, married the respondent, Harold Brown. At the time of the marriage the petitioner was a spinster of independent means, aged forty-eight, and the respondent was a working chauffeur, aged twenty-seven. The marriage was a secret one. On September 15, 1933, four days after the marriage, the petitioner signed a proposal form for an immediate annuity to her husband, and the Prudential Assurance Company thereupon entered into a deed whereby they agreed both with the petitioner and with the respondent to pay to the respondent or his assigns an annuity of 104*l.* The consideration paid by the petitioner for this annuity was 2097*l.* 10*s.* 2*d.*

The marriage between the parties having been dissolved, the point arises upon a petition for variation of settlement whether the annuity so granted to the respondent is a settlement within the terms of s. 192 of the Act of 1925.

On behalf of the petitioner it is contended that it is a post-nuptial settlement within the wide meaning which has always been given to this word in this section. The respondent, however, contends that it is a gift and contains no kind or degree of limitation, no lack of plenum dominium, and, in short, no characteristic whereby it could, by any fair construction of language, be described as a settlement.

No question arises as to whether the disposition (to use a neutral expression) was post-nuptial or not. The plain point at issue is simply whether the annuity is a settlement or a gift. A tantalizing aspect of the matter is that the point is very nearly covered by authority which is not only binding upon me, but which I would readily and gladly follow. Indeed, if it were right and fair to extract a single passage from a judgment and to apply the words there used in a merely literal sense, without taking into consideration the

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occasion of their use and the general context, it could be claimed, as counsel claimed for the petitioner, that Romer L.J., when sitting in the Court of Appeal before he became a regular member thereof, has actually covered this case. In *Bosworthick* v. *Bosworthick* (1) he says: "We have had numerous authorities cited to us going as far back as 1861, and amongst them an authority which is binding on this Court, and in my judgment those authorities establish that when a husband has made a provision for his wife, or a wife for her husband, in the nature of periodical payments, that amounts to a settlement within the meaning of the section." If I were at liberty to take those words literally, without reference to "those authorities" to which the Lord Justice refers, and ignoring the facts of the cases to which they applied, my troubles in this case would be at an end. The Lord Justice walks with swift stride and sure step over this kind of ground, where I feel that I walk haltingly and am prone to stumble. I could not wish for a safer guide, and I have only left the secure shelter of this authoritative pronouncement with the greatest reluctance. I cannot, however, shut my eyes to the fact that the real point under discussion in *Bosworthick* v. *Bosworthick* (1) was whether an annuity secured by a bond could be treated under this s. 192 as a settlement, and the Lord Justice is only purporting to decide what was before him and before the rest of the Court—namely, whether a bond was a settlement. Scrutton L.J., while deciding in the same way, because he felt that the Court of Appeal was bound by its own decision in *Dormer* v. *Ward* (2), threw out a challenge to Chancery minds as to how they could bring the legal concept of "bond" within their accustomed uses of the word "settlement." Romer L.J., giving the next judgment, appears to me to be saying: "I am not interested in the challenge because I have to deal not with what Chancery Lawyers may choose to think but with what an Act of Parliament—not necessarily or even probably the product of Chancery minds—has actually provided." It is also clear that in the expression "those

(1) [1927] P. 64, 71. (2) [1901] P. 20.

authorities," Romer L.J. is referring only to the authorities cited before him, none of which includes in express terms the point which is now before me. I am therefore sadly afraid that I am actually in the kind of difficulty foretold and foreseen with a characteristic touch of slightly malicious enjoyment by Scrutton L.J. in the concluding sentence of his judgment. This is not to say that the decision in *Bosworthick* v. *Bosworthick* (1) is not of great importance in reference to the present case. I am at the moment only saying that it is not a clear and binding authority. It is, for example, clear authority for the proposition that an annuity as such is not to be excluded from the expression "settlements" included in the section, and it was plausibly argued on behalf of the petitioner in this case that if, on the authority of *Bosworthick* v. *Bosworthick* (1), an annuity secured by bond was a settlement, was not an annuity secured by deed a fortiori a settlement also? Moreover, the powerful authority of Hill J. was pressed in aid to show that the fact that a covenant to pay proceeds from a third person does not prevent the disposition from being regarded as a settlement under the Act. In *Prinsep* v. *Prinsep* (2) Hill J. says: "The particular form of it does not matter. It may be a settlement in the strictest sense of the term, it may be a covenant to pay by one spouse to the other, or by a third person to a spouse. What does matter is that it should provide for the financial benefit of one or both of the spouses as spouses and with reference to their married state." Again, however, it must be borne in mind that Hill J. was dealing with a payment by trustees. He was not considering what I may perhaps call an outside contract with an Insurance Company in the sense of being outside of and independent of any family arrangement of property.

The petitioner also relied upon *Dormer* v. *Ward* (3), which was a case decided upon the earlier Acts containing the same words, but it was not suggested that it was directly in point.

(1) [1927] P. 64. (2) [1929] P. 225, 232.
(3) [1901] P. 20.

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It is a decision of the Court of Appeal which went a long way towards extending the meaning of the word "settlement," and it is the authority upon which the Court of Appeal really founded their decision in *Bosworthick* v. *Bosworthick* (1), but it sheds no special light upon the particular problem in this case. Similarly, *Worsley* v. *Worsley and Wignall* (2) was cited in favour of the petitioner. If the headnote in that case could be taken at its face value, again I think that my problem would be solved. The headnote says: "All deeds, whereby property is settled upon a woman in her character as wife, and to be paid to her whilst she continues a wife, come within the scope of 22 & 23 Victoria Chapter 61, section 5, and the Court has power to deal with them." The annuity deed in the present case is certainly a deed, so that if this were a correct statement of the law as decided by the Judge Ordinary, there would remain little more to be said. When, however, one studies the facts, the argument and the judgment in that case, it is clear that what was really occupying the Court was the question whether a separation deed between the husband and wife partook of the character of a post-nuptial settlement. As I read that case, there was no real dispute as to whether the deed in question was a settlement, and the Judge Ordinary determined the point at issue in these words: "The Court would have a great difficulty in saying that any deed which is a settlement of property, made after marriage, and on the parties to the marriage, is not a post-nuptial settlement. It would not be justified in narrowing the reasonable scope of the words used in the section. The substance of the matter is, that the legislature by this section has armed the Court with authority to make special arrangements in the case of a woman being found guilty of adultery, in reference to property settled upon her in her character as a wife. The substantial feature to bring the case within the clause of the statute is, that a sum of money is paid to a woman in her character as wife, or is settled upon her in that character and whilst she continues a wife."

(1) [1927] P. 64. (2) L. R. 1 P. & M. 648, 651.

Another important decision of the Court of Appeal which was pressed upon me on behalf of the petitioner was *Melvill* v. *Melvill and Woodward*. (1) The particular instrument there under review differed toto coelo from an annuity obtained from an Insurance Company, but again the Court of Appeal insisted upon the wide interpretation which was given to the section, and Lord Hanworth M.R., after collecting the various expressions enjoining this kind of interpretation, concludes his review with a commendatory citation of almost the whole of the short judgment of Romer L.J. in *Bosworthick* v. *Bosworthick* (2), to which I have already referred.

It is perhaps not surprising, in the circumstances, that at the conclusion of the argument for the petitioner I was left with the impression that I ought, if it were in any way possible, to hold that this deed was a post-nuptial settlement. I struggled hard to do so, but I regret to say I have failed.

The argument for the respondent, put before me most attractively, may be summarized in a sentence. The annuity is a gift and not a settlement. It is true, of course, as pointed out by Romer L.J., that in order to discover the meaning of the word " settlement " in this conjunction one has not to look at Davidson on Conveyancing, or any other of the enchanting volumes which occupy the working and no doubt the leisure hours of the inhabitants of Lincoln's Inn, but only to the words and the intention of the statute itself. But if one finds that the transaction in question contains none of the attributes of a settlement and all or practically all of the attributes of a gift, it would seem that one has reached the point where it is time to call a halt in the very desirable expansion of the ambit of this section.

In the case of *Hubbard* v. *Hubbard* (3) the Court of Appeal held decisively, and almost without troubling to give reasons for their decision, that an absolute assignment of a leasehold house and furniture to a wife was not a settlement, and did not acquire that character even in a case where the property

(1) [1930] P. 99, 159, 171, 172. (2) [1927] P. 64.
(3) [1901] P. 157.

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passed through the hands of trustees. It is interesting to observe that in so doing they approved the decision of the President in another case of *Chalmers* v. *Chalmers* (1), whilst at the same time reversing his decision in the case under consideration. They also declined, as Romer L.J. declined twenty-five years after, to found any decision upon cases decided under other Acts of Parliament, such as the Bankruptcy Act; so that their decision is in no way at variance with the later decisions. It is an express decision upon the meaning of the word "settlement" in the circumstances in which it is here employed.

For my part, it appears to me that the payment of a sum of money to an Insurance Company to purchase an annuity for the respondent comes closer to the analogy of an assignment of property or goods than to any parallel that can be drawn from a bond. Accordingly I feel that I am much more nearly bound by *Hubbard* v. *Hubbard* (2) than by *Bosworthick* v. *Bosworthick* (3), but even if I am not bound, since the decision is not directly in point, I cannot distinguish this annuity from a gift. It is to be observed that the covenant to pay is with the respondent as well as with the petitioner, and it appears to me that when once the petitioner has handed over the consideration money, she has parted with the plenum dominium of the property so transferred. It is no limitation of his property that the payments to be made to the respondent are to be made annually. The respondent can take, and in this case in fact has taken, steps to realize the immediate value of what has been transferred to him, and the position seems to me to be accurately reflected in the judgment of Neville J. in the case *In re Brunning. Gammon* v. *Dale.* (4) Neville J. says: "Now it seems to me that the origin of the rule, that where money is bequeathed to be invested in the purchase of an annuity it must be regarded as a vested legacy from the death of the testator of the sum that will purchase an annuity, was the idea that it was a matter of indifference whether

(1) (1892) 68 L. T. 28.
(2) [1901] P. 157.
(3) [1927 P. 64.
(4) [1909] 1 Ch. 276, 279.

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the annuitant had his annuity purchased for him or received in cash the sum that would purchase it, because, if the annuity was purchased for him, he could sell it the next day. If that is so, I think the result is that when an annuity has been paid for a time the annuitant has the right, which passes to his legal personal representative, to say 'Give me the sum that will purchase the annuity from now onwards,' and that he is entitled to be paid the sum that would purchase the annuity as at the date of the last payment to him." I have not, of course, overlooked the fact pointed out by counsel that *Brunning's* case (1) concerns a disposition by will, but it seems to me to illustrate rather clearly the character of an annuity when considered in relation to the recipient.

Upon the same line of reasoning counsel for the respondent cited *Standing* v. *Bowring*. (2) That is a decision of the Court of Appeal of very high authority, pointing the distinction between a transfer of property with and without a resulting trust and deciding that there is no resulting trust if rebutted by showing a gift.

Counsel for the petitioner struggled hard in reply to argue that the transfer of this sum of 2097*l.* 10*s.* 2*d.* could not be regarded as a gift because the recipient, the respondent, can never have been in a position to part with the whole of it, since the Insurance Company must be taken to have secured some profit to themselves before agreeing to pay 104*l.* per annum. I do not for a moment doubt the commercial soundness of this assumption, but it would seem to follow, if it be also legally sound, that a gift in pounds sterling to be converted into francs for the benefit of a French beneficiary, would no longer be a gift if a bank or money-changer were to exact their usual quota of profit on the exchange. This seems to be unarguable, and the fact that it is put forward at all is perhaps indicative of the nakedness of the land. I do not pretend to have found the elusive principle to which Scrutton L.J. mockingly referred in *Bosworthick's* case. (3)

(1) [1909] 1 Ch. 276. (2) (1885) 31 Ch. D. 282.
(3) [1927] P. 64.

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I can only base my decision upon the view which I have formed, that this annuity is not a settlement because it is a gift.

It remains to note a point made with force by counsel that the Court could not as a practical measure vary this arrangement, since the Insurance Company is in no sense before the Court. The only covenant by the company is to pay to the respondent, and if the Court relieves the company of that obligation, the company alone will benefit, since no order of the Court can impose upon the company a new obligation to pay some one else. This difficulty, though formidable at first sight, is not perhaps insuperable. I have not explored the possibilities of a garnishee order, nor the possibility of an order directing the respondent to pay over the amount of the annuity as and when received to the petitioner. Owing to the view which I have expressed on the main question, these matters do not arise. It should be understood, however, that I have not based my view on this branch of the argument, though I am not sure that it does not throw some additional light on the real quality of the transaction between the spouses.

Motion dismissed with costs.

Solicitors for the petitioner : *Church, Adams & Tatham.*
Solicitors for the respondent : *Capel Cure & Ball.*

R. M. M.

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Oct. 15.

Summary Jurisdiction — Maintenance — Subsequent dissolution of marriage by Foreign Court of competent jurisdiction—Grounds of decree not recognized by English Law—Application to rescind order for maintenance—Fresh evidence—Discretion of Court—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict. c.* 39), *s.* 7.

A court of summary jurisdiction, purporting to exercise the discretion conferred by the Summary Jurisdiction (Married Women) Act, 1895, s. 7, refused to discharge or vary a maintenance order made during the subsistence of a marriage since dissolved by the decree of a competent foreign Court. The reasons for their refusal were (*a*) that the marriage had been dissolved on grounds not recognized by English law, and (*b*) because the wife's financial position required the continuance of the maintenance :—

Held, that neither of these grounds showed a judicial exercise of the discretion, because there was no longer a subsisting marriage and the summary jurisdiction court had no concern with the reasons for its dissolution, and, in addition to the continuance of the maintenance being inconsistent with the German decree, it was without the province of the summary jurisdiction court to decide whether the former wife should be maintained by her former husband or by becoming chargeable to public assistance.

Observations on the necessity of evidence of identity of parties to a foreign decree. *Pastre* v. *Pastre* [1930] P. 80 followed. *Bragg* v. *Bragg* [1925] P. 20 distinguished.

APPEAL from a court of summary jurisdiction.

Max Rudolph Mezger, the husband, appealed from the refusal of a court of summary jurisdiction on September 12, 1936, to discharge upon fresh evidence an order originally made by that court on January 12, 1935, finding the appellant guilty of wilful neglect to maintain Erna Anna, the respondent wife, and ordering him to pay 5*s.* for her maintenance, varied as to amount by subsequent orders of April 13, 1935, and August 17, 1935, respectively. The parties were both of German origin and nationality and were born in Germany. They were married in New York in 1928 and then came to reside in London. In 1932 they separated, and the orders of the court of summary jurisdiction followed. On January 29, 1936, in proceedings instituted by the husband, a German Court "annulled" the marriage finding that by conduct short of adultery the wife had been guilty of

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"violation of matrimonial duty" and that the husband could not be "expected to continue this matrimony." The marriage was accordingly put an end to, the German Court finding the wife and not the husband responsible, and an appeal to a higher German tribunal was rejected on June 12, 1936. It appeared that in the German Court, where the parties mutually recriminated, there had been an allegation of the wife that the husband had failed to maintain her, and it was decided that there was no such failure according to the means of the husband. Thereupon the husband took out a summons returnable before the court of summary jurisdiction according to the provisions of the Summary Jurisdiction Act, 1895, s. 7, for the discharge of the orders for maintenance on fresh evidence, the fresh evidence being the decree of the German Court. The court of summary jurisdiction received the evidence of a German lawyer that the German decree was a valid and good one in Germany and binding on the parties and that the marriage was now definitely at an end in Germany. No further evidence was taken in the court of summary jurisdiction as to the identity of the parties or their domicil. On these materials the court of summary jurisdiction dismissed the application to discharge the orders, the reasons being stated to be that the wife was not alleged to be guilty of adultery and the justices considered that the dissolution of the marriage in Germany on grounds not recognized here was not a sufficient reason for the discharge of the order, and further that the wife's financial position had not changed and required a continuance of the maintenance ordered, and, therefore, they exercised in her favour their discretion under the section. The grounds of appeal were that the court below were wrong in refusing to discharge the order on fresh evidence, that the discretion of the court to discharge it should have been exercised in favour of the appellant, and that the refusal to discharge it was wrong on the facts and in law.

The identity of the parties with those the subjects of the German decree was now admitted, but not that their domicil was German.

M. H. Lush for the appellant. The place of birth and domicil of origin of both parties was German. The onus of establishing a fresh domicil lies on the party asserting it, and as no such evidence was produced the decree of the German Court is binding universally. *Winans* v. *Attorney-General* (1); *Bragg* v. *Bragg* (2) will no doubt be relied upon to support the argument that the order for maintenance was not put an end to by the decree of dissolution, but the fact that that decree had been made was fresh evidence within the meaning of s. 7 of the Summary Jurisdiction Act, 1895, and as the decree of the German Court was universally binding, assuming domicil, the court below was not properly concerned with the grounds of it or the divergence of grounds from those of dissolution in English law, so long as the German decision was not contrary to natural justice. In *Pastre* v. *Pastre* (3) the question was whether the allowance ordered on a decree of judicial separation of this Court could survive a decree of divorce pronounced by a foreign Court of competent jurisdiction. The reasoning of Hill J. in that case is conclusive of the present. The second reason for the decision appealed from is not one competent for the justices. They had no jurisdiction under the Act of 1895, s. 7, to decide whether the respondent should in future be supported by the appellant or by the public assistance system, which is in effect the matter of their decision: *The Queen* v. *Boteler.* (4)

G. C. Tyndale for the respondent. Whatever may have been the domicil of the parties at the time of birth, there is no proof of their domicil at the date of the decree of divorce. The court below had before them the mere fact of the German decree and the expert evidence of its effect. They had no materials for finding a German domicil. Even assuming that they had such materials they were not obliged to revoke the order. They had a discretion: *Bragg* v. *Bragg.* (2) They have rightly exercised it for the reason given in their finding and their decision.

Lush in reply.

(1) [1904] A. C. 287.
(2) [1925] P. 20.
(3) [1930] P. 80.
(4) (1864) 33 L. J. (M. C.) 101.

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THE PRESIDENT (SIR BOYD MERRIMAN). This appeal from the justices sitting at Lexden and Winstree in Essex raises a very interesting point and one which at first sight certainly is not easy to determine. The parties had been before the same court of summary jurisdiction on several occasions. An order had been made in favour of the wife for maintenance, and without going into unnecessary detail, that order had been the subject of discussion before the same court on several occasions between the time when it was made in 1935 and the application which is the subject of the present appeal; but I need not go into any detail about that. It is enough to say that on September 12 last the husband made an application to the court for a revocation of the order for maintenance on the ground that on January 29, 1936, the marriage had been dissolved by the decree of a German Court at Frankfort and that it was a valid and binding decree of dissolution of marriage throughout the world. The justices declined to revoke or vary the order; hence this appeal.

At first I thought that the real substance of the appeal related to the validity of the decree of divorce, but, for reasons which I will give in one moment, I am now satisfied that that is not the real point of substance. On the application the husband gave no evidence himself at all. He contented himself by putting in the decree of the Frankfort Court and calling a German lawyer to say that it was a good and valid decree. I protest against this method of procedure. Strictly speaking, that was no evidence at all until the identity of the parties referred to in the decree had been established by some evidence. It is admitted here, and no doubt was treated below as common ground, that the decree did relate to these parties; but if the proper course had been taken of putting the husband in the box to say: "I am the person who appeared before the Court and in relation to whom that decree was given," he could also have given some evidence that I think ought to have been given, that he was amenable to the jurisdiction of the Court, and that fact could have been further substantiated by the evidence of the German lawyer who was called. The husband could have said in one sentence:

" I am a domiciled German," or he could have said : " I am a German national," and if it be the law in Germany that nationality is enough, the German lawyer could have said so. No foundation of that sort was laid, and counsel for the respondent, as he was perfectly entitled to do, has argued that the foundation is not sufficiently laid for the reception of that decree as a decree binding throughout the world, dissolving this marriage, though he has admitted that it is a good decree in Germany and he has admitted that it applies to these parties.

If there really was no dispute at all about it in the court below, as I say, the matter could have been dealt with in one sentence of the witness' evidence ; but I think it is most unsatisfactory that in a case of this character the question of jurisdiction to dissolve the marriage, which was the basis of the application, should not have been proved in the usual way. The question still remains whether on the admissions that have now been made it is sufficiently proved, and I find, though with some difficulty and after elaborate examination of the documents, which would have been quite unnecessary if the evidence I have indicated had been given, that the validity of the decree of dissolution was sufficiently proved. When once it is admitted that it relates to the parties, the decree itself shows that they were both born in Germany. Counsel has quite rightly insisted that he is prepared to make no further admission than that. He is not prepared to admit that Germany was the domicil of origin : he says it may have been a mere accident that the husband was born in Germany, the parents may have been travelling there, or anything of the sort ; it is all left in doubt.

But that is not all. The decree states that they were both born in Germany and goes on to state that they were both German nationals. It also shows that they were married in New York in 1928 and were living in England for business reasons, he being the representative of a German firm. It also quite plainly appeared from a very full record of the hearing and from a very full record of the reasons of the judgment, not merely that they both submitted to the

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jurisdiction, but that the wife made substantial counter-charges against the husband and supported them herself before the Court.

In these circumstances and having regard—though I do not wish to attach too much importance to this, certainly not as an excuse for the party not giving evidence which ought to have been given—to the presumption in the case of domicil of which counsel for the appellant reminded us, I think, not merely that there was material on which foundation for the validity of the decree was laid, but that the justices were bound on the material available to find that this was a good and valid decree, throughout the world, of dissolution of marriage by a Court of competent jurisdiction in respect of two parties who were amenable to the jurisdiction of that Court.

Now that being so, the point which I think is the real one, and the point which is of interest in this case, emerges. Counsel for the respondent argued that, even assuming that this was a good and valid decree and that the parties at the time of the hearing of the application in September had ceased to be husband and wife for all time and throughout the world, nevertheless, the justices sitting in this petty sessional division of Essex were right in refusing to revoke this maintenance order, and he founded himself on the decision in *Bragg* v. *Bragg*. (1) In that case, where a wife had succeeded in this Court in obtaining a decree for dissolution which decree had been made absolute, it was held by a Divisional Court that that decree did not of itself vacate the subsisting order for maintenance, and that, though the pronouncing of the decree was unquestionably new matter for the consideration of the justices, a change of circumstances which they were entitled and bound to consider, it did not oblige them to revoke the order for maintenance already made. In other words, the matter was one for the discretion of the justices, and counsel says exactly the same argument applies here, and there is nothing to show that the justices have exercised their discretion wrongly.

(1) [1925] P. 20.

It goes without saying that we are bound by the decision of *Bragg* v. *Bragg*. (1) So far from appearing to criticize the decision of *Bragg* v. *Bragg* (1), if I may say so with great respect, it seems to me to be a most useful decision, because it enables this Court to allow the parties, without starting fresh proceedings, to rely on orders already made by magistrates, whether with regard to maintenance or with regard to custody and other consequential matters on which otherwise they would have to start proceedings, either substantive proceedings such as a maintenance petition, or ancillary proceedings such as the taking out of a summons, which would cause unnecessary expense. But while following not merely loyally but cordially the decision in *Bragg* v. *Bragg* (1) it is necessary to see how far it goes and how far it applies to the circumstances in this case. The magistrate in that case set out in full the reasons which had actuated him and which found approval in this Court. He said on p. 22 of the report: "It would appear that in this case no alimony was granted by the Divorce Court, or indeed applied for; and I will assume for the purpose of my judgment that, if applied for, it might still be granted there. I do not, however, think, having regard to the status of the parties, that it could be more conveniently dealt with there, but less conveniently; and I do not, therefore, consider that the matter of discharging this order could in any way be said to be appropriate to the provisions of s. 7 of the Act of 1895." Now what the learned magistrate was saying was: "Here is a woman in favour of whom I made a maintenance order on the ground of desertion. She has since the making of that order been able to add to it a charge of adultery and on the two combined issues to get a decree of dissolution from the Divorce Court, and no doubt she could have followed that up during the process of the suit by an application for alimony pendente lite; but she did not; she went on having the money under my order and she could now follow it up by filing a maintenance petition. She has not done so and I think it is convenient that this order should go on." Then

(1) [1925] P. 20.

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this Court held that he was quite right in saying so, the order was not ipso facto vacated and it met the reality of the case.

As I have said, there is nothing in that that meets with anything but my cordial approval. But that is not this case. In this case the justices have given the reasons on which they decided to exercise their discretion and I will read them, because they are quite short, in full: "It was not alleged the wife had been guilty of adultery, and the justices considered that the fact that the marriage had been dissolved in Germany on grounds which would not be recognized in this country, was not a sufficient reason for them to discharge the order, and furthermore the wife's financial position had not changed and she required the maintenance payable under the order for her support, and the justices, therefore, exercised the discretion in her favour."

There are two grounds there. The first is that the divorce was pronounced on grounds which are not recognized in this country, and the second is that the woman required the money. Counsel for the appellant says that neither of these grounds is a judicial exercise of a discretion at all. Now I propose to examine that contention. It is quite true that this decree was pronounced on grounds which are not recognized in this country. As I have said, the record is full and clear and it appears that it was pronounced on the ground that by insulting behaviour and incompatibility of temper, and other matters of that sort, the wife had failed to fulfil her marriage obligations (quite plainly a ground that is not recognized in this country). But the fact that the decree was conclusive in Germany, of which the court below was assured, has not been challenged here. That was the foundation for a divorce in the country where the divorce was pronounced and to the Courts of which country these parties were amenable.

In those circumstances, in my opinion, the justices have got nothing whatever to do with the question whether the grounds for divorce are recognized in this country or whether they approve of them or do not approve of them. The matter was put with characteristic terseness and accuracy by Hill J.

in a passage already referred to in argument in the case of *Pastre* v. *Pastre.* (1) The case was somewhat similar though not exactly the same as this case. The question was, this Court having pronounced a decree of judicial separation with the consequential allowance of alimony, whether that would be allowed to survive a decree of divorce pronounced by a French Court. Hill J. said this: "A decree of the French Court was made upon a ground which would not be a good ground here—namely, the existence for three years of a decree of judicial separation. But it is the decree of a Court of competent jurisdiction in a proceeding in which the wife was an active party." I stress those words. "It follows that the petitioner and the respondent are no longer husband and wife."

There the matter begins and ends; that is all with which any Court in this country is concerned, and it is no business of the justices, in my opinion, to inquire whether there is lacking the element of adultery, which is a necessary ingredient in this country. For that reason their decision, in my opinion, is invalid.

I now look at their other reason. Counsel stated it and supported it in his argument in a way which brings out the naked simplicity of the reason even more clearly than it appears on the face of the justices' decision. He said they may well have thought that it was better that her former husband should pay for her maintenance than that she should become chargeable to the Guardians. It rather looks to me as if that was what they had thought. In my opinion that is no judicial exercise of the discretion. The law of this country provides for the chargeability of the husband for the maintenance of his wife. It does not provide for the chargeability, through the machinery of a Court of summary jurisdiction, of a former husband for the maintenance of a former wife when the marriage has been dissolved; and it is not for justices to consider whether it is better that a particular individual who happens no longer to be the woman's husband should support her or whether the public should support her. In my opinion it is not a judicial exercise

(1) [1930] P. 80, 82.

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of discretion to say that the woman required the maintenance for her support and that therefore the justices exercised a discretion to continue it.

However convenient and proper it may be in cases, where the facts are as they were in the case of *Bragg* v. *Bragg* (1), that a maintenance order should be continued and not revoked after a decree of dissolution, I find it impossible in a case where the marriage has been dissolved by a Court of competent jurisdiction in a foreign country after a contest in which the parties mutually recriminated, where the allegations of the husband have been found to be proved and the counter allegations of the wife have been held to be disproved, and when incidentally one of her counter-charges related to an alleged failure by the husband to maintain her and the Court decided that there had been no such failure having regard to his means, and in a case where it follows that this Court could not have any jurisdiction to entertain a claim either for compassionate allowance or for maintenance in any shape or form, because the parties could not possibly come before the Court, and there is, therefore, no question of the relative convenience of a continuing maintenance order in the police court and the alternative—of incurring the expense of coming before this Court—to say in all these circumstances that there is a judicial exercise of discretion in continuing the award of maintenance as between these former spouses who have for ever ceased to be husband and wife.

I am quite satisfied that the two reasons which have been given are bad reasons, and in the circumstances of this case I find it impossible to imagine any reason which would justify the continuance of this order. The appeal, therefore, will be allowed.

LANGTON J. I agree, and since we are differing from the magistrates' decision, I will add a few words. I agree with the judgment that has just been delivered because I am satisfied that when once the German Court, a Court of

(1) [1925] P. 20.

competent jurisdiction dealing with its own nationals, both of whom had agreed to submit their dispute to that tribunal, had arrived at a decision, it was a clear, final and binding decision upon all the world, and there was, therefore, no ground left upon which the magistrates could exercise discretion. I would add that I have considerable sympathy with the magistrates in this case. The point now, after exhaustive argument, has become clear; but it is by no means a simple matter, and the authorities on the subject are not really helpful to a lay tribunal. I think there is no kind of conflict when they are examined here. The case of *Bragg* v. *Bragg* (1), as my Lord has said, indicates a very convenient instrumentality by which the Courts of this country may, so to speak, interweave their respective powers and obtain the advantage of local knowledge to supplement or implement the decree of the Court. The case of *Bragg* v. *Bragg* (1) provides an instance of the kind. In that case the order for maintenance existed when the wife obtained her decree. It is not surprising that in the English Divorce Court the Divisional Court should have found it right and convenient that an order for maintenance should be continued. There is nothing there which could shock anybody's conscience, and it was very convenient from the point of view of expense and avoidance of litigation. The present circumstances, which are analogous to those of the case my Lord has quoted of *Pastre* v. *Pastre* (2), are even stronger than the circumstances in that case. They differ entirely from the circumstances in *Bragg* v. *Bragg*. (1) The order for maintenance being in existence under the magistrate's decision the parties went to Germany and there fought out their differences. The wife lost on every issue, as I read the judgment, and then came back to this country and upon an application being made to discharge the maintenance order, which would clearly be at variance with the whole tenor of the German decree, the magistrates considered that they still had discretion to deal with this maintenance order. I think there was no possible ground for the exercise of discretion under these circumstances. The parties are no longer man

(1) [1925] P. 20. (2) [1930] P. 80.

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and wife, and any order for maintenance would be in direct conflict with the decision of the German Court.

For these reasons I think this appeal must be allowed.

Appeal allowed, maintenance order discharged. Wife's costs up to 20l., subject to taxation.

Solicitors for the appellant: *Campbell, Hooper & Todd.*
Solicitors for the respondent: *Wilberforce Allen & Bryant.*

R. M. M.

1936

Oct. 19, 20.

THE CURLEW.

Shipping—Collision—"Under way"—"At anchor"—Anchor of sailing barge foul of moorings of a dredger—Lights to be exhibited—Port of London River Bye-laws, 1914–34, *Nos.* 5 *and* 14.

While the defendants' sailing barge was dropping down the River Thames on the tide the anchor of the barge fouled the chain of a dredger lying just above Battersea Bridge. The barge continued to exhibit the regulation side lights and stern light for a sailing vessel under way. About half an hour afterwards, the master of the plaintiffs' tug, which was coming down the river with six barges in tow, saw the red light of the sailing barge and thought that she was under way and about to pass through the bridge. In attempting to avoid the sailing barge, when it was realized that she was foul of the dredger, the tug and one of her craft in tow struck the bridge and received damage.

Bye-law 5 of the Port of London River Bye-laws, 1914–34, provides that "the expression 'under way,' when used in relation to a vessel, means when she is not at anchor, or moored, or made fast to the shore, or aground, and includes a vessel dropping up or down the river with her anchor on the ground."

Bye-law 14 provides that "a vessel under one hundred and fifty feet in length when at anchor or moored shall, by night exhibit forward . . . . a white light. . . . . ":—

Held, that the sailing barge was "at anchor or moored" within the meaning of bye-law 14, and ought to have taken in her side lights and put up an anchor light, and that she was alone to blame.

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ACTION of damage.

The plaintiffs were the Union Lighterage Co., Ld., owners of the steam tug *Bruno* and the tank barge *Hector*; the defendants were the owners of the sailing barge *Curlew*.

The plaintiffs' case was that on the evening of December 28, 1935, the *Bruno*, with six empty barges in tow, was coming down the River Thames on the ebb tide, and as she was shaping to pass through the centre arch of Battersea Bridge the red light of the *Curlew* was seen about in the middle of the arch. The master of the *Bruno* thought that the *Curlew* was driving down river on the tide and eased his engines to give her time to clear the bridge and to follow her through the arch. In fact, however, the *Curlew*, in dropping down the river with her anchor down, had fouled one of the chains of a dredger moored close to the central arch, and, with her navigation lights still exhibited, had remained fast for nearly half an hour before the *Bruno* and her tows came down. As soon as the master of the *Bruno* realised that the *Curlew* was foul of the dredger he endeavoured to get through No. 2 arch, but struck the top of the arch and the *Hector* struck the abutment, damaging both the tug and the *Hector*.

H. G. Willmer for the plaintiffs. The *Curlew* was not "under way"; she was to blame (*a*) for fouling the dredger, and, (*b*) having done so, for keeping her side lights exhibited; although there is no direct authority on the point, the case referred to in Marsden's Collisions at Sea, 9th ed., p. 328, indicates that under the circumstances she ought to have put up an anchor light: she was "at anchor or moored" within the meaning of bye-law 14 of the Port of London River Bye-laws. (1) In *The Hero* (2), where the facts were almost exactly similar, the sailing barge had put up an anchor light, and no one took the point that she was wrong in so doing.

Owen L. Bateson for the defendants. The *Curlew* hoped to get clear at any moment; she was not riding to her anchor or moored; and it was at least doubtful if under the circumstances she should have put up an anchor light. The

(1) Set out in the headnote. (2) (1923) 14 Ll. L. R. 15.

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plaintiffs had ample time and opportunity to see what had happened to her and could have avoided her and passed through the bridge without damage.

Cur. adv. vult.

1936. Oct. 20. BUCKNILL J. read the following judgment: In this case the Union Lighterage Company are claiming against the owners of the sailing barge *Curlew* for damage sustained by their tug *Bruno* and their dumb barge *Hector*. The plaintiffs allege that this damage was caused by the negligence of the defendants' servants in charge of the *Curlew*. The damage was done about 5.45 P.M. on December 28, 1935, and was received when the *Bruno* and the *Hector* struck Battersea Bridge. There are five arches to this bridge and the top of the wheel-house of the *Bruno* struck the top of the No. 2 arch of the bridge counting from the north side.

The case made by the master of the *Bruno*, put shortly, was that he was coming down the Thames with six empty barges in tow in three ranks. The total length of the flotilla was about 330 feet and its maximum beam was about 49 feet. The *Bruno* herself is about 76 feet long and 20 feet beam.

The weather was dark but clear, there was a moderate wind—there was some dispute as to its direction—but I accept the master's evidence that at Battersea Bridge it was south-easterly. The tide was ebb, about two hours after high water, with a force of about three knots.

There was a P.L.A. steam dredger moored head up river about in line with the south abutment of the centre arch of the bridge and about 100 feet above the fire float which in its turn is moored with its stern about 100 feet above this abutment. The dredger was exhibiting the three triangular white lights prescribed by bye-law 18 for a steam dredger moored in the river and had four breast chains out—two forward and two aft. port and starboard. The starboard breast chains had about 175 feet on each chain and were laid at an angle on the bow and quarter and were in fact slack at the time.

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The *Bruno*, as I find, was coming down the river about mid-channel at a speed of about four knots through the water and was shaping to pass through the centre arch, which was the arch normally used by her master, who has been a master of tugs for twelve years. He seldom uses No. 2 arch. As he approached the bridge he saw a red light of a vessel, which turned out to be the *Curlew*, about in the middle of the centre arch. The master of the *Bruno* thought that the vessel was a sailing barge which was driving down river on the tide, and that she was showing the proper under way lights for a sailing barge under such circumstances, and he accordingly eased his engines from full to slow in order to follow the *Curlew* down through the centre arch, and blew one short blast to indicate to the sailing barge that he was going to pass to the southward of her and that he wanted the barge to sheer away to the northward after she cleared the bridge and thereby give the *Bruno* more room to pass to the southward of her.

The master of the *Bruno* said, and I see no reason to doubt his evidence, that he expected to pass through the centre arch without difficulty after the *Curlew* had passed through. About the same time as he noticed the *Curlew* he put his helm amidships, and thereafter kept his tug and tows heading for the centre arch. Shortly afterwards the master of the *Bruno* saw the red light of the *Curlew* shut in and her green light appeared under the centre of the middle arch, and he then realized that there was something wrong, and guessed correctly that the anchor of the *Curlew* on which she was dredging down river, had fouled the moorings of the dredger lying just above the bridge. The master of the *Bruno* came to the conclusion that if he continued on his course for the centre arch he was bound to run down the sailing barge, and to prevent this happening he put his wheel hard-a-port and shortly afterwards hard-a-starboard to try to get through No. 2 arch, but he failed to get clear through this arch and the damage was done which is the subject of the action. The reason why he failed to clear this arch was that, owing to the sudden action which he had to take, he was more to

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the southward of the exact centre of the arch than he would have been if he had approached it in a normal way. At that state of tide the width of the clear water way available for him and his tow under No. 2 arch was very limited.

Now in this case I have only heard the evidence of the plaintiffs because the defendants, I expect wisely, elected to call no evidence. I accept as accurate the evidence called on behalf of the plaintiffs. I am satisfied that the master of the *Bruno* kept heading for the central arch and intended to go through it until he realized that the *Curlew* was stationary, and that he was compelled to depart from this intention by the position of the *Curlew*. I am also satisfied that at the time when he took action to make No. 2 arch instead of the central arch the *Curlew* was lying in the fairway approaching the central arch in such a position as to block that arch for the *Bruno* and her craft in tow.

I have asked the Elder Brethren whether in their opinion the circumstances were such that a careful tug master ought to have realized sooner than the master of the *Bruno* realized, that he could not make the central arch owing to the position of the *Curlew*, and they say No. I have also asked them whether in their opinion the master of the *Bruno* took the right action when he did realize that the central arch was blocked for him by the *Curlew*. On this point they advise me that the master of the *Bruno* was justified in trying to make No. 2 arch in preference to the risk of trying to turn head to tide, having regard to the length of his tow and the strength and set of the tide. I agree with this advice, which coincides with my own view on these matters. I therefore absolve the *Bruno* from blame as regards her navigation.

I have now to consider whether the *Curlew* was to blame, and if so whether her negligence caused the damage in dispute. In my view the damage to the *Bruno* was solely due to the fact that the *Curlew* was improperly exhibiting the navigation lights for a sailing vessel under way and thereby misled the master of the *Bruno*. The evidence before me proved that the *Curlew* when approaching the P.L.A. dredger was warned

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by a watchman on the dredger not to drop her anchor on the bottom, but notwithstanding this warning, she did so, and in consequence her anchor fouled the starboard aft mooring chain of the dredger. I think, and the Elder Brethren agree with me, that this was an act of negligence on the part of the *Curlew*. Thereafter the *Curlew* remained with her anchor foul of the anchor attached to this mooring chain of the dredger and thereby remained fast for nearly half an hour before the collision between the *Bruno* and the bridge. Notwithstanding this, the *Curlew* continued to exhibit her under way lights in breach of the Thames bye-laws, right up to the collision in question, although she had ample opportunity to take them in. The *Curlew* was certainly not "under way" within the meaning of those words as defined by the Rules. Mr. Bateson argued that it was doubtful whether the *Curlew* could be said to be at anchor or moored under the circumstances and whether she ought to have exhibited the light prescribed by bye-law 14 for vessels at anchor or moored. If it is necessary for me to decide the point I hold that the *Curlew* was at anchor or moored within the meaning of bye-law 14, and that she ought not only to have taken in her under way lights, but she ought also to have exhibited an anchor light, because she was in fact riding to her anchor, which was foul of the chain of the dredger. The Elder Brethren agree with me that under the circumstances the *Curlew* ought to have exhibited an anchor light when her anchor held her. There will be judgment for the plaintiffs with costs.

Solicitors for the plaintiffs: *Keene, Marsland & Co.*
Solicitors for the defendants: *J. A. & H. E. Farnfield.*

E. C. M. T.

1936
Sept. 25.

KING *v.* BISHOP OF TRURO.

Ecclesiastical law—Vacant benefice—Institution of new incumbent—Notification of vacancy to parochial church council—Condition precedent—Non-existence of parochial church council—Benefices (Exercise of Rights of Presentation) Measure, 1931 (21 & 22 *Geo.* 5, *No.* 3), *s.* 1.

By s. 1 of the Benefices (Exercise of Rights of Presentation) Measure, 1931, a vacancy or impending vacancy in a benefice shall be notified by the Bishop to the parochial church council:—

Held, that the giving of this notification was a condition precedent to the power of the Bishop to institute an incumbent to the vacant benefice, even though there was no parochial church council in existence.

MOTION before Lewis J. sitting in the Vacation Court.

This was a motion for an injunction to restrain the defendant, the Bishop of Truro, from instituting an incumbent to the vacant benefice of St. Hilary, Marazion, Cornwall.

The following facts are taken from the affidavits of the plaintiff, Miss Ann Maria King, a parishioner, and of Mr. Alan Fox Harvey, solicitor, and registrar of the diocese of Truro and legal secretary to the defendant.

The benefice of St. Hilary, Marazion, Cornwall, was vacant following on the resignation on August 27, 1936, of the late incumbent, the Rev. Nicole Bernard Walke. There is not at present and was not in existence at any time preceding the said resignation a parochial church council for the said parish of St. Hilary, and no electoral roll for the said parish had been maintained or prepared.

By s. 1 of the Benefices (Exercise of Rights of Presentation) Measure, 1931 (21 & 22 Geo. 5, No. 3): "A vacancy or impending vacancy in a benefice shall be notified by the Bishop to the patron and the parochial church council."

On May 29, 1936, the defendant, the Bishop of Truro, by the registrar, sent a notice of impending vacancy in the benefice of St. Hilary by registered post addressed to the secretary, St. Hilary Parochial Church Council. This notice was returned by the then incumbent on the following day,

May 30, 1936, stating that a parochial church council did not exist.

Notice was also sent by the defendant to the Rev. Canon Edmund Willoughby Sara, the Chancellor of Truro Cathedral and secretary to the patron, the Dean and Chapter. On August 25, 1936, the defendant gave to the churchwardens of the parish of St. Hilary notice under s. 2, sub-s. 2, of the Benefices Act, 1898 (61 & 62 Vict. c. 48), of the intended institution, and a copy of this notice was posted on the church door on the following day, August 26, 1936.

The benefice became vacant on August 27, 1936, and the Rev. Charles Geoffrey Roffe-Silvester was appointed by the said patron on September 5, 1936. The defendant stated that, unless restrained by the Court, he intended to institute the person so appointed to the vacant benefice on September 28, 1936. Thereupon the plaintiff instituted these proceedings.

F. H. L. Errington for the plaintiff. By s. 1 of the Benefices (Exercise of Rights of Presentation) Measure, 1931, a vacancy or impending vacancy in a benefice shall be notified by the Bishop to the patron and to the parochial church council. That must mean that the notification must be made to a live council, and such notification is a condition precedent to the Bishop's right to institute. It is not sufficient to go through the form of sending the notification addressed to the secretary of a council when the council addressed does not in fact exist. Such notice would be merely futile. But the fact that there is no church council in existence does not absolve the Bishop from the necessity to comply with the obligations of s. 1 of the Measure, because under cl. 25 of the Schedule to the Representation of the Laity Measure, 1929 (19 & 20 Geo. 5, No. 2), he has power to take steps for the creation of a parochial church council, and this he could do in a very short time. Until that council comes into existence, and the vacancy has been duly notified to it under s. 1 of the Measure of 1931, the institution of an incumbent ought to be postponed.

J. B. Blagden for the defendant. The notification sent on behalf of the defendant on May 29, 1936, was a good

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notification under s. 1 of the Measure of 1931. By s. 3 of the Parochial Church Councils (Powers) Measure, 1921 (11 & 12 Geo. 5, No. 1), every parochial church council shall be a body corporate and shall have perpetual succession, and the notification was received by the then incumbent and sent to the two churchwardens of the parish of St. Hilary, and all of these were, by cl. 10, sub-cls. (i.) and (ii.) (*b*), of the Schedule to the Representation of the Laity Measure, 1929, members of the council. Therefore, by mere force of law this council did, in fact, exist, and the notification was duly sent to it. In view of these provisions it is a fallacy to say that the basis of a parochial church council is the electoral roll. Alternatively, if there is no church council in this parish, the Bishop was excused from complying with s. 1 of the Measure of 1931.

LEWIS J. This is a motion to restrain the Bishop of Truro from instituting an incumbent to the benefice of St. Hilary, Marazion, Cornwall, until such time as he has complied with the requirements of s. 1 of the Benefices (Exercise of Rights of Presentation) Measure, 1931. The plaintiff contended that before an institution could take place the provisions of that section must be complied with. Sect. 1 of that Measure is as follows: "A vacancy or impending vacancy in a benefice shall be notified by the Bishop to the patron and the parochial church council." The patron was duly notified, and no question arises on that. And on May 29, 1936, the Bishop sent a notice of the impending vacancy in St. Hilary's Church addressed to "The Secretary, Parochial Church Council, St. Hilary." That letter was returned to the Bishop on the following day with an intimation that there was no parochial church council in St. Hilary.

The question for my decision is whether s. 1 of the Measure of 1931 makes it a condition precedent to the right to institute an incumbent to a vacant benefice that the Bishop should have notified the vacancy to the parochial church council. In my opinion it does. Mr. Errington for the plaintiff has contended that, as there was in fact no council in existence,

the notice of May 29, 1936, was futile. On the facts I find that there was no such council in existence in the parish, and that, consequently, the condition precedent was not fulfilled. This does not mean that there can be no institution to this benefice, for Mr. Errington has pointed out that under the provisions of cl. 25 of the Schedule to the Representation of the Laity Measure, 1929, the Bishop can remedy the present state of things in a very short time, and then, in due course, can proceed to institute.

It was contended by Mr. Blagden, for the defendant, that, in fact, there was a church council for this parish in existence. He said that that was so by mere force of law, in that since the passing of the above Representation of the Laity Measure, 1929, every parish has had a church council, which is a body corporate having perpetual succession. But I do not think that Measure can be construed in that way, and I am of opinion that there was not at this time, and never has been, a parochial church council in this parish. But the Bishop is not thereby absolved from complying with the requirements of s. 1 of the Measure of 1931, because, as I have already indicated, there is a method under the Measure of 1929 by which he can remedy the defect which prevents him from complying with the section at this time. He must take steps under the latter Measure to have a parochial church council constituted before he proceeds with the institution, having given to the council notice of the vacancy.

The plaintiff is entitled to an order restraining the defendant from instituting an incumbent to this vacancy pending compliance with the requirements of s. 1 of the Benefices (Exercise of Rights of Presentation) Measure, 1931.

Solicitors for plaintiff: *A. J. Adams & Adams, for Coulter Hancock & Thrall, Truro.*

Solicitors for defendant: *Gregory, Rowcliffe & Co., for Sitwell, Harvey & Money, Truro.*

W. L. L. B.

1936
Dec. 16, 21.

THE MADRID.

Shipping—Collision—Jurisdiction—Lis alibi pendens—Service on a foreign corporation—Share register office within jurisdiction—No effective remedy under foreign law—Right to proceed in this country —Companies Act, 1929 (19 & 20 *Geo.* 5, *c.* 23), *ss.* 344, 349, 352.

A Greek vessel and an Argentine vessel came into collision in the River Parana; the Argentine vessel sank, and, it was alleged, became a total loss.

On September 30, 1936, proceedings were instituted in the Argentine by the owners of the sunken ship, an Argentine corporation; the owner of the Greek ship put in a counter-claim, but on October 27 withdrew it. Meanwhile, on September 30, he had issued the writ in the present proceedings in this country, and served it by leaving a copy at the London office of the Argentine Corporation which had been established for the purpose of the transfer and registration of shares. The Argentine Corporation moved to set aside the writ, or alternatively to stay the proceedings, on the grounds, amongst others, (*a*) that the corporation only carried on business within the jurisdiction so far as claims connected with the share register were concerned; (*b*) that the proceedings were vexatious and oppressive as there was an action pending in Argentina, where all the corporation's witnesses as well as the chief witnesses for the Greek ship resided; and further that the plaintiff had no effective remedy, inasmuch as Argentine law must be applied in this country, under which, if a vessel was a total loss, liability being limited to the property available, her owners were under no liability at all.

By s. 352 of the Companies Act, 1929, the expression "place of business" includes a share transfer office:—

Held, (*a*) that as the corporation had a place of business within the jurisdiction it was amenable to the jurisdiction for all purposes and not merely to the limited jurisdiction suggested; (*b*) that the plaintiff's action could not be stayed merely because he was defendant elsewhere; that it could not be said, as in *Dawkins* v. *Prince Edward of Saxe Weimar* (1876) 1 Q. B. D. 499, that on the facts of the declaration no cause of action was shown; and that the question whether the plaintiff's claim was groundless depended on facts which he was entitled to have tried, and that accordingly the motion failed.

MOTION on behalf of the defendants, an Argentine company, owners of the steamship *Madrid*, to set aside a writ and the service of the writ issued by the plaintiff, the owner of the Greek steamship *Epaminondas C. Embiricos*, or alternatively

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to stay all further proceedings in the action on the following grounds :—

(*a*) That the defendants were a foreign corporation having no residence and carrying on no business within the jurisdiction.

(*b*) That the writ was bad in that it incorrectly stated that the address of the defendants was 14 Leadenhall Street, in the City of London.

(*c*) That service was not effected either in the manner prescribed by Order IX., r. 8, or in accordance with the provisions of s. 349 of the Companies Act, 1929.

(*d*) That the action was an abuse of the process of the Court in that an action arising out of the same collision was already pending in the Courts of the Republic of Argentina, to whose jurisdiction the plaintiff had already consented.

The facts are sufficiently summarized in the headnote and are fully set out in the judgment.

Carpmael K.C. and *H. G. Willmer* for the defendants. The defendants do not carry on business in this country within the meaning of s. 344 of the Companies Act, 1929. They merely have an office for the registration and transfer of shares, and although under s. 352 a "place of business" includes a share transfer office, the establishment of such an office does not make the defendants amenable to the jurisdiction except as regards matters connected with the share register. Certainly before 1907, when the Companies Act of that year provided for share transfer offices, the establishment of such an office would not make a foreign company amenable to the jurisdiction : see *Badcock* v. *Cumberland Gap Park Co.* (1). In *Employers' Liability Assurance Corporation* v. *Sedgwick, Collins & Co., Ld.* (2), where the name of a person who was authorized to accept service on behalf of the company was put on the file without any limitation, the present point was not considered.

[*Pilcher K.C.* referred to *Sabatier* v. *The Trading Co.* (3)]

(1) [1893] 1 Ch. 362. (2) [1927] A. C. 95.
(3) [1927] 1 Ch. 495.

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In that case an agent was put on the register as a person authorized to accept service and the purpose was unlimited.

Secondly, the service of the writ was bad, for it was not served on the person registered as authorized to accept service of process, but was left at the office where the share register happened to be; the object of registration is to get service at the place registered and no reason is given for not complying with the statute: see *Fester Fothergill and Hartung* v. *Russian Transport and Insurance Co.* (1)

Thirdly, and this is the substantial point, the proceedings are not bona fide and on several grounds are an abuse of the process of the Court. (*a*) The collision was intra fauces terrae, and there can be no question but that Argentine law will have to be applied: see *The Arum* (2), where it was held that although by English law compulsory pilotage is no longer a defence, it could be successfully pleaded in the case of a collision which took place off the Mole at Gibraltar, where by a general regulation applicable to the Admiralty waters pilotage was compulsory: cf. *Owners of S.S. Reresby* v. *Owners of S.S. Cobetas* (3), a Scottish case in the Outer House where Lord Blackburn applied the lex fori although the collision was in foreign territorial waters, but he intimated that had the collision been intra fauces terrae the local law would have been applicable. This decision, even confined to territorial waters, is, however, contrary to a number of English authorities: see Dicey's Conflict of Laws, 5th ed., Note 28, p. 987, which is particularly applicable to the present case. (*b*) All the defendants' witnesses and the chief witnesses for the plaintiff are in the Argentine. (*c*) The action is bound to fail. The *Madrid* is a total loss, and under Argentine law that extinguishes the defendants' liability altogether, for liability is limited to the value of the property. It is not a question of remedy but of substantive law. Where foreign law merely limits liability, then the process of the English Courts is open, but where the foreign law extinguishes liability altogether

(1) [1927] W. N. 27. (2) [1921] P. 12.
(3) 1923 Sc. L. T. 719.

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then no action will lie here. The point will be taken on the pleadings, but meanwhile this action as well as the action in the Argentine will have to go on. When coupled with all the other circumstances, therefore, the action is frivolous and vexatious and should be stayed: see *Dawkins* v. *Prince Edward of Saxe Weimar*. (1) In any event, the question as to the effect of the Argentine law should be argued as a preliminary point of law and could conveniently be done on this motion.

[Reference was also made to *Phillips* v. *Eyre*. (2)]

G. St. C. Pilcher K.C. and *H. L. Holman* for the plaintiff.

[BUCKNILL J. I need not trouble you on Mr. Carpmael's first point.]

As regards the service of the writ, it was served at the company's place of business, i.e., the place where the share and transfer register was kept, and, as Mr. Dodero, who was registered as the person authorized to accept service of process, was abroad, the requirements of s. 349 were satisfied by leaving a copy of the writ at the share transfer office.

As regards the third point, there is no authority for the proposition that a defendant can stay an action merely because he may have a complete defence to the claim; and, as regards the proceedings in the Argentine, a plaintiff is not debarred from proceeding in this country, where he may have a better claim, merely because he has been made defendant elsewhere: *The Janera*. (3) The defendants may or may not have a good defence under Argentine law to the proceedings here; that depends on facts which they must prove. Liability may be determined by the Argentine law but the remedy by the lex fori. The motion, therefore, is entirely without merits at this stage. *Phillips* v. *Eyre* (2) has no bearing on the present case, and in *Dawkins* v. *Prince Edward of Saxe Weimar* (1) it was obvious on the face of the record that the action would not lie. Here there can be no question that a claim in respect of damage caused by the negligence of the defendants' vessel affords prima facie a good cause of action,

(1) 1 Q. B. D. 499. (2) (1870) L. R. 6 Q. B. 1.
(3) [1928] P. 55.

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and the plaintiff does not consent to have the merits tried on this motion.

Carpmael K.C. replied.

Cur. adv. vult.

1936. Dec. 21. BUCKNILL J. read the following judgment: This is a motion by the Compania Argentina de Navigacion Mihanovich Limitada (hereinafter called "the company") for an order that a writ of summons issued by the plaintiff as owner of the Greek steamship *Epaminondas C. Embiricos* and served upon the company may be set aside, or alternatively that all further proceedings in the action be stayed.

The writ in question was addressed to the company "of 14 Leadenhall Street in the City of London." The indorsement on the writ is as follows: "The plaintiff claims compensation for damage and loss occasioned by and arising out of a collision which occurred between the plaintiff's steamship *Epaminondas C. Embiricos* and the defendants' steamship *Madrid* in the River Parana during the month of September, 1936, owing to the negligence of the defendants or their servants." The first point taken on behalf of the company as a ground for setting aside the writ was that the company does not carry on business within the jurisdiction of this Court. The facts relevant to this point are that the company is a corporation carrying on business within the territory of the Republic of Argentina, Brazil, and the ports of the coast of South America. The company in 1935 established a share register in London at the offices of the Anglo-South American Bank, Ld., at 117 Old Broad Street. In compliance with s. 344, sub-s. 1 (*c*), of the Companies Act, 1929, the company having established a place of business within Great Britain in the form of a share register, duly registered with the Registrar of Companies, the name of Mr. Jose Arneldo Dodero, of 14 Leadenhall Street, as a person resident in Great Britain authorized to accept on behalf of the company service of process and any notices required to be served on it.

It was argued on behalf of the company that it had established a place of business in Great Britain solely for the

purpose of a share register, and therefore that it was only amenable to the jurisdiction in respect of claims connected with the share register. I do not think that this is sound. Sect. 352 of the Companies Act, 1929, enacts that the expression "place of business" includes a share transfer office. The company has in my view a place of business within the jurisdiction and is therefore amenable to the jurisdiction for all purposes. In *Employers' Liability Assurance Corporation* v. *Sedgwick, Collins & Co.* (1) Lord Parmoor pointed out that the main object of s. 274 of the Companies Act, 1908 (now replaced by s. 344 of the Act of 1929), was to take away any difficulty in the service of a writ on foreign corporations carrying on business in this country, and in effect to place a foreign corporation for this purpose on the same footing as an English company and render it liable to the service of a writ under a similar form of procedure. In this case before me the company, to quote Lord Parmoor again, by filing with the Registrar of Companies the name and address of Dodero, submitted voluntarily to the jurisdiction of the English Courts, and on this account cannot subsequently be heard to object to such jurisdiction. I do not think that a company can submit to such a limited jurisdiction as is suggested on behalf of the company.

The second point taken on behalf of the company was that the writ had not been properly served. Sect. 349 of the 1929 Act requires in effect that the writ should be served on the person whose name has been delivered to the Registrar, in this case upon Dodero. But the section goes on to say that if at any time such person cannot be served the writ may be served on the company by leaving it at any place of business established by the company in Great Britain. In the present case, when the writ was issued Dodero was abroad and a true copy of the writ was left at the offices of the Bank of London and South America, Ld., at 6 Tokenhouse Yard, London, it being the place where the share transfer office of the company was established at that time. This appears to me to have been a proper service under the circumstances.

(1) [1927] A. C. 95, 115.

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The third point taken was that the proceedings in this Court should be stayed because there were other proceedings pending abroad between the same parties in respect of the same collision, and that under these circumstances these proceedings were vexatious and oppressive.

The facts relevant to this point are that the collision occurred in the River Parana, and that on September 30, 1936, the company instituted an action in rem against the plaintiff's vessel in the Courts of the Republic of Argentina claiming damages in respect of the total loss of the *Madrid* and her cargo. In that action the *Epaminondas C. Embiricos* was arrested, and eventually a guarantee in lieu of bail was given by the plaintiff. On October 14, 1936 (fourteen days after the writ in the action in this Court was issued), the plaintiff through the master filed in the action in Argentina a counterclaim in respect of the damage sustained by the *Epaminondas C. Embiricos*, but on October 27 he filed a further document whereby he withdrew his counterclaim.

It appears to me that the plaintiff has not by reason of his action debarred himself from his right to proceed in this Court on the writ issued by him. A very similar state of facts was considered by Hill J. in *The Janera* (1), where he said: "It seems to me quite clear that the Court ought not to stay a plaintiff in the Courts of this country on the ground that he happens to be a defendant elsewhere . . . . It is said that I ought to stay the action here . . . . In general, if the cross-action brought by the plaintiffs were still pending in Egypt I think the proper course would have been to put them to election, but as they have already elected and acted upon their election, and have abandoned the proceedings in Egypt, and as there are no proceedings by them anywhere else, I cannot interfere or deprive them of a right which otherwise undoubtedly they possess, to sue in this country."

It was argued on behalf of the defendant company that in this case these proceedings were vexatious and oppressive, not only because the liability for the collision could be more conveniently decided in the Courts of Argentina, that being

(1) [1928] P. 55.

the country where all the defendant company's witnesses resided, but also because the plaintiff had no effective remedy in this Court against the defendant company owing to the fact that the collision in question caused the *Madrid* to sink and to become a total loss. The defendant company put in an affidavit by an Argentine lawyer in which he argued that according to the law of the Argentine Republic when a vessel has become a total loss in consequence of a collision her owners are excused from all liability for the collision, that is to say, that their liability being limited to the property, i.e., the ship and any freight available, if the ship is of no value, then there is no liability whatever.

On behalf of the plaintiff it was argued that he was entitled to issue his writ and have the question of the liability of the defendant company for the collision determined in this country, and that the attempt of the defendant company to set aside the writ on the ground that the defendant company was not under any liability was premature.

It is no doubt true that the Court has power to stay proceedings in an action if on the face of it there is no cause of action. This was done, for instance, in *Dawkins* v. *Prince Edward of Saxe Weimar*. (1) In that case Blackburn J. said (2): "Have we, although we see the action is utterly groundless, a right to stop it summarily? I grant that is a jurisdiction which in all cases should be very carefully exercised by the Court." Again, Mellor J. in that case said (3): "It is manifest upon the face of the declaration and the affidavits that it would come to a non-suit. I think we should be allowing the time of the public and the Court to be wasted if we did not interpose and take this course."

It appears to me that at the present stage of the case it would be quite impossible for me to say that the plaintiff's action is utterly groundless or that it must come to a non-suit. The question will turn upon the provisions of the law of Argentina as much as upon the facts as to the state of the *Madrid*, and the facts upon neither of these heads are agreed

(1) 1 Q. B. D. 499. (2) Ibid. 502.
(3) Ibid. 503.

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or determined. There will also be the point for decision whether the Argentine law or the English law applies to this action in this Court, so far as the liability of the company is concerned.

It was finally suggested by Mr. Carpmael on behalf of the company that it would be convenient and a saving of expense to decide the question of the liability of the company upon the hearing of this motion. Mr. Pilcher, on behalf of the plaintiff, declined to agree to such a course, and in the absence of such agreement I cannot decide a disputed question of liability on a motion to set aside the writ. According to the law of England the company is prima facie liable for the negligent navigation of their ship, and a claim based on such alleged navigation prima facie discloses a good cause of action.

The motion, therefore, fails and must be dismissed with costs.

Solicitors for the plaintiffs : *Ince, Roscoe, Wilson & Glover.*
Solicitors for the defendants : *Thomas Cooper & Co.*

E. C. M. T.

FARNHAM *v.* FARNHAM otherwise DANIELS.

1936
April 23;
Oct. 19;
Nov. 20.

Nullity of Marriage—Incapacity of woman to consummate—Finding of frigida quoad hunc—Birth of child to woman as a result of intercourse with another man—Declaration of paternity by woman—Admissibility of evidence—Distinction between non-consummation and adultery—Bastardy of child—Rule in Russell v. *Russell not applicable.*

On a petition by the man for nullity of a marriage celebrated in April, 1933, the Court found on the facts, subject to the admissibility of evidence, that the marriage had never been consummated by reason of the woman being frigida quoad hunc and that she had given birth to a child in August, 1935, after leaving the man in September, 1933, and had confessed intercourse with another man to whom she ascribed paternity. On these findings the Court held that the evidence tendered was not rendered inadmissible in a case of nullity by the rule in *Russell* v. *Russell* [1924] A. C. 687. The exclusion by that rule of the evidence of a spouse negativing the legitimacy of offspring does not extend to the exclusion of evidence negativing the existence of married intercourse. The right of the man to prove that the woman is unable to consummate the marriage with him cannot be destroyed by reason of her having given birth to a child who is from the nature of the case illegitimate.

In a suit for nullity of marriage for want of consummation there is no issue as to adultery; non-consummation once established, adultery becomes an irrelevant though necessary inference, as also bastardization, when the birth of a child has occurred.

George Frederick Farnham, the petitioner, suing as a poor person, sought a decree of nullity of a ceremony of marriage through which he had gone on April 15, 1933, with Beatrice May Farnham otherwise Daniels, by reason of the incapacity of the respondent to consummate the same. Before the ceremony attempts were made by the petitioner to have intercourse. After the ceremony attempts were frequent. All attempts failed. An operation on the respondent was medically advised but not submitted to by her. Since September 26, 1933, there had been no cohabitation. Orders for maintenance under the Summary Jurisdiction Act were made from time to time, and on October 11, 1935, the present

Note.—The case, which was heard in camera, is reported ex relatione the counsel appearing.

See Supreme Court of Judicature (Amendment) Act, 1935 (25 Geo. 5, c. 2), s. 4.

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petition was filed. There was no answer, and in due course the medical inspectors of the Court reported that the petitioner appeared capable of performing the act of generation and that the respondent had not presented herself for examination. On August 6, 1935, the respondent had given birth to a male child. The birth was registered by the respondent, the name of the father being left in blank; the petitioner having inspected the register of births identified the handwriting of the informant in the entry in the register as that of the respondent. The remaining evidence is stated in the judgment.

R. J. A. Temple for the petitioner. The evidence is admissible, and if admitted establishes a case of impotence quoad hunc. If the petition succeeds the decree will be retrospective. (1) Therefore there will have been no marriage and there will be no child born in wedlock who will be bastardized. The rule in *Russell* v. *Russell* (2) is inapplicable. There is a distinction between cases of alleged adultery and those in nullity in which the existence of a marriage is negatived. [He also referred to the following cases: *Goodright* v. *Moss* (3); *Rex* v. *Sourton* (*Inhabitants of*) (4); *Aylesford Peerage* (5); *Poulett Peerage* (6); and *C.* (*otherwise H.*) v. *C.* (7)]

Cur. adv. vult.

1936. Nov. 20. LANGTON J. This is an undefended nullity case. It has had an unfortunate history. It came on for trial on April 23 this year, but on that day the petitioner was not in Court. It transpired that he had waited throughout the previous day, and I allowed his evidence to stand over rather than that the case be struck out. It is a suit brought under the Poor Persons Rules, and counsel who appeared for the petitioner told me with perfect frankness that there was a

(1) See *Newbould* v. *Attorney-General* [1931] P. 75.
(2) [1924] A. C. 687, 706, 711, 712, 713, 716, 718, 719, 724, 725, 728, 731.
(3) (1777) 2 Cowp. 591, 592.
(4) (1836) 5 Ad. & El. 180.
(5) (1885) 11 App. Cas. 1, 11.
(6) [1903] A. C. 395, 399.
(7) [1921] P. 399.

strong ground for believing that the respondent has given birth to a child. The managing clerk of the petitioner's solicitors gave evidence concerning the inquiries he had made. The medical inspector of the Court who had examined the petitioner also gave evidence, and the case then stood over until October 19. At this hearing a letter was produced, in the handwriting of the respondent, stating in the clearest and most emphatic terms that she was the mother of a child born at Southlands Hospital, Shoreham, Sussex, on August 6, 1935, and giving the name of the father. A birth certificate confirming these facts save as to the date of birth which is stated in the certificate as August 5th, was also before me. The certificate did not state the name of the father. In the circumstances, I cannot doubt that the respondent Beatrice May Farnham did in fact give birth to a male child on August 6, 1935.

The ceremony of marriage between the petitioner and the respondent took place on April 15, 1933. The petitioner's history of his relations with his wife was not such as to command any sympathy for him, but I am satisfied that this evidence, which reflected anything but credit upon him, was completely truthful. He said that he had known his wife for some eighteen months before the ceremony, and that four months after he had met her he began to try to have intercourse with her. He described in some detail repeated attempts to have connection on a settee in a sitting-room. He appears to have ascribed his non-success in his own mind to the unwillingness of the woman, though she offered no active resistance. After the ceremony of marriage had been performed the woman appears to have been quite willing, and the petitioner says positively that she endeavoured to assist him, but it was of no use because she was too small. The woman visited a lady doctor at a hospital, and this lady gave evidence before me, and told me that she found no abnormality, and that she advised treatment for dilatation. No record, however, existed in the hospital of the woman having subsequently attended for treatment. In September, 1933, Mrs. Farnham left the petitioner, but although returning two

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days afterwards left again and has not returned. If it be assumed that all the evidence before me is admissible in law, I find the material facts to be: That the marriage between George Frederick Farnham and Beatrice May Daniels celebrated in Edmonton on April 15, 1933, has never been consummated: that it has not been consummated because the woman Beatrice Daniels is frigida quoad hunc in regard to the petitioner or in other words is incapable of performing the act of intercourse with this man: and that nevertheless she has given birth on August 6, 1935, to a male child.

It now falls to be considered whether any, and if so how much, of the evidence adduced before me must be excluded by reason of the rule of law affirmed in the case of *Russell* v. *Russell*. (1) I have read and re-read the speeches of the five members of the House of Lords who addressed the House upon that case, and I conceive that however much I may be swayed by the dissenting opinions, I am bound strictly and entirely by the opinions of the majority. The original expression employed by Lord Mansfield in *Goodright* v. *Moss* (2) was "... declarations of a father or mother cannot be admitted to bastardize the issue born after marriage." Without the guidance of the majority opinions in the *Russell* v. *Russell* (1) case, I feel sure that for my own part I should have interpreted the expression here used as excluding only such declarations as were tendered with the object of bastardizing, and not as excluding such as were tendered for some object the attainment of which would not have any actual legal effect upon the legitimacy of the child. But I cannot shut my eyes to such an expression as this from Lord Birkenhead in *Russell* v. *Russell* (3): "... the rule as laid down by Lord Mansfield and other great judges, is a general rule to be applied, in the full generality of its scope to all cases which it is wide enough to cover"; or, clearer still, Lord Finlay (3): "There is no ground for the suggestion that it is confined to cases in which it is sought to establish legitimacy or illegitimacy as a matter of status by proceedings in the

(1) [1924] A. C. 687.
(2) 2 Cowp. 591, 592, 594.
(3) [1924] A. C. 687, 704, 706, 711, 712, 713.

nature of proceedings in rem. It applies in every case in which, for any purpose it becomes necessary to determine the question whether a child born of the wife during the marriage is the child of the husband." It is true that in later passages he lays stress upon the point that the evidence is intentionally directed to the point of illegitimacy of the child : " The whole object of the evidence in the present case is to bastardize the child so as to prove adultery. The respondent's argument on this point rests on the misapprehension of the meaning of the term ' bastardize ' employed by Lord Mansfield in *Goodright* v. *Moss* (1), to which I have adverted in commenting on that case. The term covers all cases in which the evidence is given to prove the illegitimacy of the wife's child born during the marriage." Also (2) he says : " The rule does not exclude evidence by husband and wife of non-access universally ; what it does exclude is such evidence given to prove the illegitimacy of a child born during the marriage. It has never been held that its applicability is confined to ' legitimacy cases '—it applies to every case in which legitimacy is in dispute." And later on the same page : " The rule applies to all evidence by husband and wife of non-access in order to show that a child born of the wife after marriage is illegitimate. As the Master of the Rolls said, the evidence which the husband and wife may give is subject to all legal restrictions, and one of these is that they cannot be called to disprove intercourse so as to bastardize the child." And again : " In the present case, the charge of adultery rests solely upon the birth of a child, which is said to be bastardized by the husband's proof of non-access. It falls within the very terms of the rulings of Lord Mansfield and Lord Ellenborough. This evidence is given directly for the purpose of bastardizing the child, and is the only evidence of the adultery." As I will point out hereafter these passages may suggest a line of distinction between the *Russell* case and the present case, but in view of the earlier formal and explicit pronouncements, the broad line of distinction that

(1) 2 Cowp. 591, 592.
(2) [1924] A. C. 687, 704, 706, 711, 712, 713.

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the legitimacy of the child is not the primary issue in the case and is not affected in law by the result of the suit is not open to me here. Indeed in dealing with an argument which had been adduced in respect of nullity suits, Lord Finlay went even further and used the following language (1): "We have been referred to the practice of admitting the evidence of the husband and the wife in nullity suits, and in suits for cruelty as between husband and wife. Such suits have no relevance to the present question. In them there is no question of paternity or of bastardizing issue. It is immaterial with what object such evidence is given, but, unless there is a child, and the evidence is to shew that that child is not the child of the husband, the rule never comes into play at all." This passage gives much food for reflection in conjunction with the present case, and I will return to it later, but for the moment it is significant to note the phrase: "It is immaterial with what object such evidence is given." So far as I can trace it this represents the highwater mark in breadth of statement to be found in any of their Lordships' opinions. Lord Dunedin argues the question with characteristic closeness: (2) "Now the two facts give rise, not to one, but to two logical and proper inferences; they lead, as I have already said, to adultery, but they also lead to illegitimacy of the child that is born. Is there any real difference, then, between this case and the case of settlement, as to legitimacy being the true issue? In both cases it is the solution of the underlying question, whether the legal father is the real father that determines the issue. In the one case the result is to declare a certain status, in the other it is to affirm a certain fact. I confess, that, so far as I am concerned, I see no real difference between the two cases, so that, according to my thinking, the dictum of Lord Mansfield applies in terms." This is far less wide than Lord Finlay, for he is arguing only for the inclusion of adultery cases within the literal terms of the rule laid down by Lord Mansfield. Then I pass from the original dictum of Lord Mansfield to Lord Halsbury's restatement of the rule in the *Poulett Peerage*

(1) [1924] A. C. 687, 716, 718. (2) Ibid. 724, 725.

case (1): "My Lords, I can only say for my own part, as regards the rule which I think most wisely and properly protects the sanctity of married intercourse and permits it not to be inquired into in any Court of law, it would be a gross perversion of that principle to say that, under the circumstances which I have suggested, the husband should not be at liberty to prove his own virtue at all events, and to prove that he had not induced the woman whom he was afterwards to make his wife to be guilty of the sin of fornication." I must confess that at first sight the ambit of the rule seems to be widened rather than narrowed by this pronouncement. This appears to be the view of at least some of those who spoke in the House of Lords in the *Russell* case. (2) If the purpose of the rule was to "protect the sanctity of married intercourse" to use the Lord Chancellor's own words, the rule must certainly be wide enough to cover evidence directed to other objects than the proof of illegitimacy, and no better example of such other objects could be given than a case of alleged adultery such as the *Russell* case. (2) But if the two statements of Lord Mansfield and Lord Halsbury should be read together as being each a statement of the rule, in perhaps alternative language, as I understand to be the ruling and intention of the majority judgment in the *Russell* case (2), a new field of inquiry seems to open when one is called upon to decide whether the rule contained in these statements is applicable to a nullity case such as the present suit.

Let us first see how the matter stands so far as the direct authority is concerned. It is I believe true that up to the present date there is no recorded instance of the application of what I will call for convenience sake the *Russell* rule to a nullity suit. In the nature of things it is hardly likely that opportunities for its application could often arise. Indeed Lord Finlay, as I have pointed out, says in terms (2) that nullity suits have no relevance to the present question. "In them there is no question of paternity, or of bastardizing issue"; and Lord Dunedin with even greater emphasis (3):

(1) [1903] A. C. 395, 399. (2) [1924] A. C. 687, 718.
(3) [1924] A. C. 687, 728.

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"No proof of conduct or want of conduct which shows nullity . . . . has the remotest reference to the point of legitimacy of issue." Both the learned Lords were in fact sweeping away the argument that it was permissible at times to invade the sanctity of married intercourse by receiving evidence from the spouses, as for example in nullity suits, by the rejoinder that in such case no question of bastardizing issue could ever arise. From these statements, it is fair at least to infer that whatever else may have been in the minds of the majority in the *Russell* case (1), at all events, the circumstances of the present suit were not present to them, and indeed were very far from their imagining. There is thus no direct authority upon this subject at all, and my task is strictly limited to determine whether the *Russell* rule should be read as applying not only to cases where the birth of an illegitimate child is relied on as proving adultery, but to the yet wider sphere of cases in which, although no reliance whatever is placed upon the fact of such birth and the fact is indeed a very awkward obstacle in the path of the petitioner, proof of non-access would nevertheless, as it were by accident, tend to bastardize a child born after the celebration of the marriage. If the original phrase of Lord Mansfield stood alone in this matter the evidence of the petitioner in this suit would appear to me to be plainly excluded. It is a "declaration" which "bastardizes issue born after marriage." But if one is to take with this Lord Halsbury's interpretation of it in the *Poulett Peerage* case (2), the matter takes a different complexion. Whilst approving and restating the general doctrine, Lord Halsbury is in fact citing it for the purpose of excluding the case under his consideration from the true limit of the rule. In the *Poulett* case (3), as in the present suit, the issue had been born after marriage, and the effect of the declaration in dispute was to bastardize such issue. Nevertheless, the declaration was admitted. The reason given by the Lord Chancellor for admitting the declaration seems to me to point to the proper ground of decision in the present

(1) [1924] A. C. 687. (2) [1903] A. C. 395, 399.
(3) [1903] A. C. 395.

case. "It would be a gross perversion" he says "of that principle to say that, under the circumstances which I have suggested, the husband should not be at liberty to prove his own virtue at all events, and to prove that he had not induced the woman whom he was afterwards to make his wife to be guilty of the sin of fornication." (1) But if an exception to the rule should be made in order to allow a man to assert his own virtue, is there not a far stronger case for an exception when the wife has already confessed her adultery, and the husband is claiming only the most elementary of his rights—namely, to prove that his marriage had never been a marriage, and that there never has been any "married intercourse" at all? For be it observed, in the present instance, there is no evidence properly so called, no legal history, as it were, of a child in the case, until the mother's confession of adultery and ascription of the paternity of the child to another man, is admitted. This confession forms no part of the petitioner's case in the present suit. It is before the Court only because the Court requires and is entitled to expect the utmost frankness from those who come to seek its assistance. If the petitioner had happened to be ignorant of the fact that his wife, who had been long ago separated from him, had borne a child, he could not have brought evidence of this, to him, inconvenient fact. His case would have proceeded along normal lines without any difficulty as to admissibility of evidence. Indeed it even falls to be considered whether his evidence of non-access could have been shut out if it had been offered in order of time before the Court were made aware of the existence of a child. In any case, one is bound to ask oneself whether the admissibility of evidence can possibly be made to depend upon such accidents of chance—or perhaps the question would be better stated as whether a man's rights in law can ever be taken from him by a mishap of this character. Stated quite plainly and fairly the result of applying the *Russell* rule in the present instance would be that a man would be prevented from proving that his marriage has never been consummated by the fact that his

(1) [1903] A. C. 399.

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wife had borne an illegitimate child. If the robust mind of Lord Halsbury rejected with just indignation the notion that any rule of evidence, however wise in itself, could prevent a man from proving his own virtue, it certainly seems to me that it must be right to recoil from the far greater injustice of taking from the petitioner in the present case his elementary right of proving that his wife was never able to consummate the marriage with him solely because she has given birth to an illegitimate child. If exceptions to the *Russell* rule are to be admitted, this case would surely appear to be a fortiori to the exception allowed in the *Poulett Peerage* case. (1)

Returning now to the majority views in the *Russell* case (2) I cannot think that a decision in favour of the petitioner here does any violence to those opinions. As I have pointed out already in considering these views in detail, Lord Finlay, although using language of a wide character at a later stage, stresses the fact that the evidence, although not perhaps primarily concerned with the legitimacy of the child, is given " directly for the purpose of bastardizing the child, and is the only evidence of the adultery." Similarly Lord Dunedin in the passage I have quoted above, puts as the basis of his reasoning that " it is the solution of the underlying question, whether the legal father is the real father that determines the issue." There is no such underlying question here. The suit is a suit for nullity, not for divorce. The issue of adultery or no adultery is not an issue in the case. It is true that if the first issue in the suit, namely non-consummation, be established, it will follow logically that in the circumstances, as we now know them, adultery must have been committed, and bastardization of the child born to the mother also follows. But not only is this not the fault of the petitioner, which is perhaps nihil ad rem, but it is not the natural or necessary result of his suit for nullity, nor do these consequences ensue from any part of his evidence which is necessary to the success of his suit. To my mind, they are extraneous to his suit, and are regrettable but irrelevant results which accidentally happen to

(1) [1903] A. C. 395. (2) [1924] A. C. 687.

follow from the decision of an issue which is in its nature quite independent thereof. Furthermore it is clear that the *Russell* rule was arrived at with a full consciousness of the practice in nullity suits, and with a plain belief on the part of those who declared it that they were in no way departing from that practice or attempting to change or minimize the rights of parties to such suits. I have not arrived easily at the conclusion which I have reached, and it is only upon very detailed examination both of the majority opinions and of the foundations upon which they are based that I have come to this decision. If I had reached an opposite conclusion, I have little doubt that the petitioner here could have obtained a divorce without difficulty. Neither have I been tempted by the merits of the petitioner to strain the law in his favour. But having reached the view which I have expressed I cannot think that it would be right to apply the *Russell* rule to this case, and thus put upon the House of Lords the responsibility for a seeming injustice which they certainly never contemplated, and which they would assuredly have desired to avoid.

Accordingly the present suit succeeds and the petitioner will be granted a decree nisi.

Solicitors : *Durrant Cooper & Hambling.*

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Dec. 14.

BURGESS otherwise LEADBITTER *v.* BURGESS.

Divorce—Nullity of marriage—Evidence—Incapacity of husband to consummate—Children born to petitioning wife during marriage as result of intercourse with other men—Evidence of wife of paternity of children.

On a petition by the woman for nullity of marriage on the ground of the impotence of the man the Court admitted as evidence statements by the woman that a child born in wedlock was the result of her ante-marital intercourse with another man and ascribing the paternity of a second child born before the hearing to a second man: *Farnham* v. *Farnham otherwise Daniels* ante p. 49 followed.

Petition by a wife for nullity of marriage on the ground of the impotence of the husband.

The marriage was celebrated in August, 1928, the wife being at the time of the marriage pregnant by another man. She now said that the husband was aware of this at the time of the marriage but nevertheless prepared to treat the child as his own. She swore that the marriage was never consummated owing to the incapacity of the husband. They separated after some months, but lived together again on two subsequent occasions. A final separation took place in October, 1935. The husband continued incapable. During the last cohabitation he had been examined by a doctor, who was now called, and his evidence was to the effect that he considered the husband incapable and malformed. About ten months after the termination of the last period of cohabitation the wife gave birth to a second child, the paternity of which she now ascribed to a second man other than the husband.

The husband had not complied with the usual order of the Court for his inspection. There was no answer to the petition.

J. Latey for the petitioner. The statements of the petitioner are admissible evidence: *Farnham* v. *Farnham otherwise Daniels.* (1)

(1) Ante p. 49.

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BUCKNILL J. This is a rather unusual case. It is a petition by a woman for a decree of nullity on the ground of the incapacity of her husband. The husband has not appeared to the petition. The parties were married in August, 1928, and, according to the evidence of the petitioner, who gave her evidence very well and, I think, truthfully, she was at the time pregnant by another man. The other man was unwilling or unable to marry her, and she said that she told her future husband of her condition and who the father was, and that he was quite prepared to marry her and to treat the child as his child. The parties went through a form of marriage, but the evidence of the petitioner was that the marriage was never consummated, owing to the incapacity of the husband. They lived together for some months, then he left his wife for about three years. Then he asked her to come back. She went back and they lived together again for eight months. The same thing happened; he was unable to consummate the marriage owing to his impotent condition; she was willing, but he was incapable. Then they parted again, and from April, 1935, they lived together again until October, 1935. The same thing happened again; he was incapable, and on this occasion the petitioner got a doctor, who was called as a witness, to examine the husband. The doctor says he came to the conclusion that the husband was sterile and was slightly malformed. In October, 1935, the petitioner left her husband. On August 6, 1936, she gave birth to a child. The petitioner has given an explanation as to the birth of that child, which is that another man was the father. The question that I have to decide is whether the evidence is admissible. Counsel for the petitioner has argued that this evidence of the wife as to the parentage of the children is admissible under the decision of Langton J. in the case of *Farnham* v. *Farnham otherwise Daniels.* (1) The facts in that case were rather different from this case, because in that case it was the husband who was petitioning for the annulment of his marriage and the difficulty which he had to get over was that his wife had given birth to a child. It was argued

(1) Ante p. 49.

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or suggested there, that to give evidence of non-consummation between husband and wife would tend to bastardize that child. I cannot see any reason in principle why the arguments which Langton J. followed in that case should not apply in this case. It may seem not such a hardship on the wife in this case to exclude the evidence as it would have been in the case of *Farnham* v. *Farnham* (1), because in this case it is she herself who, having given birth to children, is the petitioner. Under the circumstances, I think I ought to admit the evidence. I accept it and I find that her husband was at all times incapable of consummating the marriage and that the marriage never was in fact consummated.

Decree nisi.

Solicitors: *Wood, Nash & Co.*

(1) Ante p. 49.

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Dec. 15, 16.

Shipping—Salvage—Services by ship in same ownership as ship partly to blame for collision—Owners of salving ship disentitled to salvage award.

The owners of a vessel which renders salvage service to a vessel consequent upon a collision, for which another ship belonging to the owners of the salving ship is wholly or partly to blame, are disentitled to a salvage award.

APPEAL from a decision of Bucknill J. on a special case stated by an arbitrator.

The case for the opinion of the Court was whether the owners of a vessel rendering salvage services to a vessel which has been in collision are disentitled to salvage remuneration by reason of the fact that another vessel belonging to the same owners is partly to blame for the collision.

On June 16, 1935, the Canadian Pacific Ry. Co.'s liner *Empress of Britain* was in collision in the Gulf of St. Lawrence with the steamship *Kafiristan*. The *Kafiristan* was badly damaged, and the *Empress of Britain* stood by her until the steamship *Beaverford*, another ship belonging to the Canadian Pacific Ry. Co. (hereinafter referred to as the C. P. R.) came up and took the *Kafiristan* in tow. The *Beaverford* towed for about one hundred miles and then handed the *Kafiristan* over to tugs which took her to Sydney, Cape Breton. A writ was issued by the owners, master and crew of the *Beaverford* claiming salvage remuneration, but it was subsequently agreed that the case should go to arbitration and that Lloyd's Standard Form of Salvage Agreement should be signed. When the arbitration was held, liability for the collision had not been settled, and the point was raised whether, in the event of the *Empress of Britain* being found wholly or partly to blame, her owners, as owners of the *Beaverford*, would be entitled to salvage. The arbitrator (K. S. Carpmael K.C.) held that in that event the C. P. R.

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would not be entitled to any salvage remuneration, and he accordingly made alternative awards. In the event of the *Empress of Britain* being free from blame he awarded 1850*l.* to the owners and 550*l.* for expenses, 250*l.* to the master, and 350*l.* to the crew. Both parties appealed.

The collision case was then settled on the basis that the *Empress of Britain* was three-fourths to blame and the *Kafiristan* one-fourth. The appeal arbitrator (Sir Norman Raeburn K.C.), who at the request of all parties made his award in the form of a special case, held that in these circumstances the C. P. R. were not entitled to salvage, but that, in the event of the Court holding otherwise, the award to the owners made by the arbitrator should stand.

1936. Nov. 12. BUCKNILL J. read the following judgment: This case raises a question of law submitted for the opinion of the Court in the form of a special case.

In June, 1935, a collision occurred between the steamship *Empress of Britain* owned by the C. P. R. (hereinafter called "the claimants") and the steamship *Kafiristan*. In consequence of the collision the *Kafiristan* was so badly damaged as to require salvage assistance. The *Empress of Britain* stood by until the steamship *Beaverford* came up. The *Beaverford* is also owned by the claimants. The *Empress of Britain* then left and the *Beaverford* made fast to the *Kafiristan* and towed her for about one hundred miles and thereby contributed to her ultimate safety. In the following month the claimants and the owners of the *Kafiristan* signed Lloyd's form of salvage agreement.

The question of liability for the collision was subsequently settled on the basis that the *Empress of Britain* was 75 per cent. to blame and the *Kafiristan* was 25 per cent. to blame.

At the hearing of the arbitration the question was raised as to the right of the claimants to recover salvage in the event of the *Empress of Britain* being wholly or partly to blame for the collision, and in due course the matter has come before this Court for its opinion.

The main point taken against the claimants' right to recover

salvage remuneration for the services rendered by the *Beaverford* is that the necessity for these services was partly occasioned by the negligence of their agents in charge of the *Empress of Britain*, and that therefore their claim was barred on the principle that no man can profit by his own wrong.

In *Cargo ex Capella* (1) the plaintiffs, as owners of the *Southern Empire*, sought to recover salvage in respect of services to cargo on board the *Capella*. The danger to the cargo was caused by a collision between the two ships for which both were to blame. Dr. Lushington in his judgment said :—" I don't seek for authorities, but I look to the principle which ought to govern the case. In my mind, the principle is this, that no man can profit by his own wrong. This is a rule founded in justice and equity, and carried out in various ways by the tribunals of this country, and never, so far as I am aware, departed from by any English Court . . . . The rule would bar any claim by them for services rendered to the other ship which was a co-delinquent in the collision . . . ."

In *The Glengaber* (2) a vessel was placed in danger by the negligence of the tug *Black Prince* and was then salved by that tug and also by another tug, the *Warrior*. Some of the owners of the *Warrior* were also owners of the *Black Prince*. Sir Robert Phillimore decided that the owners of the *Warrior* who were also owners of the *Black Prince* could claim salvage in respect of the services of that tug. In the course of his judgment Sir Robert said :—" I have already decided that the *Black Prince* has failed in her defence as defendant in the suit of collision brought by the *Glengaber* against her, and I am of opinion that she cannot recover in this Court salvage reward for services which were rendered necessary by her own misconduct. I shall therefore dismiss the claim of the *Black Prince* with costs. With regard to the *Warrior* it has been contended that that vessel is not entitled to be considered as salvor, because it appeared in evidence that some of her owners were also owners of the *Black Prince*. This objection, if allowed to prevail, could not affect the claim of the crew, nor could it affect those owners of the

(1) (1867) L. R. 1 A. & E. 356. (2) (1872) L. R. 3 A. & E. 534.

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Warrior who are not owners of the *Black Prince*, and in my opinion it cannot be sustained. I know of no authority for the proposition that a vessel wholly unconnected with the act of mischief is disentitled to salvage reward simply because she belongs to the same owners as the vessel that has done the mischief. I shall therefore hold that the *Warrior* is entitled to salvage reward."

In *The Glenfruin* (1) the cargo of a ship was in danger owing to a breach by the owners of the carrying ship of their contract of carriage. Another ship also belonging in part to the same owners salved the cargo and claimed salvage remuneration. Butt J. held that they could not recover, and in his judgment said :—" The result is that the part owners of the *Glenavon*, who were also part owners of the *Glenfruin*, would be liable to the owners of cargo on board the *Glenfruin* for any loss occasioned by the breakdown of the machinery. In other words, such part owners (plaintiffs in the present suit) would be liable to reimburse the defendants any amount of salvage which I might award. To avoid what is termed ' circuity of action,' I must decline to make any award to those plaintiffs."

In the present case Mr. Naisby on behalf of the *Kafiristan* argued that the decision in *The Glenfruin* (1) was also right as an application of the principle that no man can profit by his own wrong. The decision in *The Glengaber* (2) was apparently not cited in *The Glenfruin*. (1) In Lord Justice Kennedy's work on Salvage this passage appears at page 83 of the second edition : " So entirely is the regard of the Court in reference to the right of salvage, fixed upon the ship itself, and not upon the owners or the mariners as individuals, that where a ship, which has been injured by collision through the negligent navigation of another ship, is salved, not by the wrongdoing ship, but by a different ship, which has been, as a ship, unconnected with the act of mischief, not only the crew, but even those owners of the salvage ship who are also interested in the wrongdoing ship are held to be entitled to salvage reward." In a note to this passage the

(1) (1885) 10 P. D. 103, 108. (2) L. R. 3 A. & E. 534.

learned author indicated that it is doubtful whether the decision in *The Glengaber* (1) is in principle reconcilable with the decision in *The Glenfruin*. (2)

It was argued on behalf of the *Kafiristan* that in 1872, when *The Glengaber* (1) was decided, the tendency of the Court was to personify the ship and to regard her rather than her owners as the entity responsible for collision damages. This tendency so far as claims for damage are concerned is illustrated by the decision of Sir Robert Phillimore himself seven years later in *The Parlement Belge* (3) which was reversed on appeal. (4) It was argued that the proper view in the present case is to fix liability not merely on the property but also on the owner through the property, and that the claimants, being the persons who are partly responsible in law for the damage, cannot claim salvage for their work done in reducing the amount of the damage.

Another case to which I was referred which deals indirectly with the question which I have to decide is *The Duc d'Aumale* (*No.* 2). (5) In that case the sailing ship *Duc d'Aumale* in tow of the tug *Challenger* was in collision with the steamship *Camrose*, owing to the negligence of all three vessels. The *Duc d'Aumale* was seriously damaged and the *Challenger* subsequently towed her into safety and then claimed salvage. The attention of the Court was mainly directed to the question whether the tug, by reason of the terms of her towage contract, was able to claim salvage, and to the question whether the crew of the tug, apart from the actual wrongdoing master, could claim salvage. The facts therefore are very different to the facts which are material to the decision in the present case before me. Gorell Barnes J. (as he then was) held that the tug owners and all the crew of the tug were debarred from claiming salvage, and in the course of his judgment referred to *The Glengaber* (1) and to *The Glenfruin*. (2) The whole passage must be considered in so far as it refers to the difference between the two decisions. It is as follows :—

(1) L. R. 3 A. & E. 534.
(2) 10 P. D. 103.
(3) (1879) 4 P. D. 129.
(4) (1880) 5 P. D. 197.
(5) [1904] P. 60, 73.

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"I proceed now to deal with the further contention that, at any rate, the crew can recover—that is, those who were not responsible for the disaster . . . . There is also the case of *The Glengaber* (1), where by the improper navigation of a steam tug a vessel at anchor was sent adrift and placed in jeopardy. Another steam tug rendered assistance to the drifting vessel, and it was held that the owners of that steam tug were entitled to an award, although some of them were also owners of the vessel which occasioned the mischief. Sir R. Phillimore, in giving judgment in favour of the owners, master and crew in that case, said that he knew of 'no authority for the proposition that a vessel wholly unconnected with the act of mischief is disentitled to salvage reward simply because she belongs to the same owners as the vessel that has done the mischief.' That case differs from the view taken by Butt J. in *The Glenfruin* (2), where it was held that the master and crew and one owner of the salving ship were entitled to salvage against the cargo of the salved vessel, though the other owners of the salving ship, who were also owners of the salved vessel, were disentitled by reason of a breach of the implied warranty that the salved vessel was seaworthy at the beginning of the voyage."

Gorell Barnes J., having thus referred to the two decisions, then went on to say: "I can understand that where the vessel which renders salvage services is entirely unconnected with the ship that is salved, those persons, like the master and crew or owners, who are not owners of the ship that is salved, or under no contractual liability to persons on board that ship, can recover salvage, but I do not think that applies to the case of a tug and her tow." In the report of the case in Aspinall's Maritime Law Reports (3) this passage is different in this respect. The words there are: "Owners, who are in no way owners of the ship that is salved, or under no liability to persons on board that ship." If the report in Aspinall is correct, the passage does not assist the claimants because they are under a liability to persons on board the *Kafiristan*

(1) L. R. 3 A. & E. 534. (2) 10 P. D. 103.
(3) 9 Asp. M. L. C. 497, 504.

owing to their negligence. If the words are "contractual liability" the passage is not detrimental to the claimants in this case. A little further on Gorell Barnes J. again refers to *The Glengaber* (1) in his judgment, without any criticism of the decision, and appears to think it may be justified on the ground that the salving tug had nothing to do with the accident which brought about the salvage.

I do not think that in this case "circuity of action" could be pleaded as a defence to this claim for salvage. Any sum awarded for salving the *Kafiristan* will be included as part of the *Kafiristan's* damage and her owners will in theory recover three-quarters of the amount from the claimants. But circuity of action can only be pleaded when the rights of the litigants are such that the defendants would be entitled to recover back from the plaintiffs the same amount of damages which the plaintiffs sought to recover from the defendants. (See *Schloss* v. *Heriot* (2), and Bullen & Leake, 3rd ed., p. 558, Note (*a*).)

It appears to me that on the whole the decided cases do not lay down any clear principle for my guidance in this case other than the principle that no man can profit by his own wrong. A general principle, often laid down as governing the validity of salvage claims, was referred to by Gorell Barnes J. in *The Duc d'Aumale* (*No.* 2) (3), where he said: "It appears to me that the Court is guided by due regard to the benefit conferred, combined with due regard to the general interests of ships and commerce."

I have to consider whether in my view it is in the general interests of ships and commerce that in a case such as the present the claimants should receive salvage remuneration for the work done by their ship, the *Beaverford*, at considerable expense to themselves in assisting the *Kafiristan*, or whether it is in the general interests of ships and commerce that they should be debarred from receiving any salvage remuneration because the negligent navigation of another ship also belonging to them was partly to blame for the damage to the *Kafiristan*.

(1) L. R. 3 A. & E. 534. (2) (1863) 14 C. B. (N. S.) 59.
(3) [1904] P. 60, 74.

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In the first place it appears to me that, so far as the point under consideration is concerned, there is not any legal difference between the case where both ships are to blame for the collision and a case where one ship is wholly to blame for the collision. On behalf of the claimants it was argued that under the Maritime Conventions Act, 1911, in cases of both to blame, the liability to make good the damage is in proportion to the degree of fault, and that therefore in this case the claimants are only liable for three-quarters of the respondent's damage, and ought to be entitled to salvage remuneration in respect of the remaining one-quarter. But I do not think that this argument is sound. Salvage services are rendered to property and not to intangible interests or liabilities in respect of property. Moreover, if this argument were correct, then the claimants would be entitled to salvage in respect of any services rendered to the *Kafiristan* by the *Empress of Britain* herself. But such a result would be clearly contrary to the decisions in *Cargo ex Capella* (1) and *The Duc d'Aumale* (*No.* 2), (2) to which I have already referred.

The general interests of commerce and navigation no doubt require that when assistance is asked by a ship in distress there should be a willing response by all other ships in a position to render assistance. And in this case, if the claimants, who at the request of the master of the *Kafiristan* rendered services at considerable expense to themselves, are held in law to be entitled to recover nothing, the result will not be encouraging as a guide to other potential salvors in the future. But I think that they are not debarred from recovering any part of such expenses, because, when I look at the case in a general way to ascertain what is fair and just, my present impression is that the expenses and loss incurred by the claimants due to the work of the *Beaverford* in rendering services to the *Kafiristan* ought to be considered as part of the general damage arising from the collision and ought to be apportioned between the claimants and respondents in proportion to their degree of blame for that collision.

(1) L. R. 1 A. & E. 356. (2) [1904] P. 60.

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It is not, however, my duty in this case to deal with this aspect of the case, or to decide whether such expenses are recoverable in law, but to give my opinion on the question raised in the case. For the same reason, I have not dealt with the point referred to by Mr. Hayward on behalf of the claimants that the respondents by entering into Lloyd's salvage agreement with the claimants, waived their right to dispute salvage. It appears to me that I have no material before me on which I could deal with the point, and that if I were to deal with it, I should travel outside the question raised for my opinion in the special case.

In answer to the question raised in the special case, my opinion is that the fact that the *Empress of Britain* was partly to blame for the collision disentitles her owners, as owners of the *Beaverford*, to a salvage award for services rendered to the *Kafiristan*.

The claimants appealed. The appeal was heard on Dec. 15, 16, 1936.

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R. F. Hayward K.C. (*Vere Hunt* with him) for the appellants. *The Glengaber* (1) is conclusive authority in the appellant's favour, for in that case although the wrongdoing tug was alone to blame for the collision, her owners, as owners of the salving tug, recovered a salvage award. Further, a new situation arose after 1911, when the Maritime Conventions Act permitted the Court to find varying degrees of fault; and the present case, therefore, is a stronger one than *The Glengaber* (1) for both vessels are to blame in different degrees.

[SCOTT L.J. The Maritime Conventions Act has not altered the general law, it merely affects arithmetical proportions.]

The Glengaber (1) has never been reversed, and the late Lord Justice Kennedy in his book on Civil Salvage, 2nd ed., p. 83, adopts it as a correct exposition of the law, although it is true that in a footnote he questions whether the decision is reconcilable with that in *The Glenfruin*. (2) The decision

(1) L. R. 3 A. & E. 534. (2) 10 P. D. 103.

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in that case, however, is based solely on the doctrine of circuity of action. Whatever amount of salvage the plaintiffs recovered they would have had to refund to the defendants as part of the damages for breach of contract. The two cases, therefore, are not inconsistent. In the present case circuity of action does not arise, for the appellants would be entitled to keep one-fourth of the award.

[SLESSER L.J. referred to *Roberts* v. *Roberts* (1) and *Montefiori* v. *Montefiori*. (2)]

It is not disputed that the maxim stated in those cases that no man shall set up his own iniquity as a cause of action, applies in some cases, as, for example, in *Cargo ex Capella* (3), which was not a claim by the owners of the wrongdoing ship, as Bucknill J. says, but a claim by the master and crew, the actual wrongdoers, who would have been profiting by their own wrong if an award had been made to them: see also *The Duc d'Aumale* (*No.* 2) (4), a case of tug and tow, where similar considerations arise.

[SLESSER L.J. referred to Temperley's Merchant Shipping Acts, 4th ed., p. 257.]

On the authorities, it is admitted that the C. P. R., as owners of the *Empress of Britain*, could not have claimed salvage if that vessel had rendered the services, but in the present case they are seeking to recover through an innocent agent, the *Beaverford*. They were trying to minimise the loss and not in fact, on the figures, "profiting from their own wrong," even if notionally it be considered that they were "wrongdoers"; for they incurred considerable damage and expenses and on the reference, if this appeal succeeds, will only get allowed one-quarter of them and one-quarter of the salvage award. The learned judge was wrong, however, in thinking that even if no salvage is payable the C. P. R. will not be debarred from recovering their proportion of the losses and expenses on the reference. These damages are too remote; they arise by reason of the agreement to take the services of the

(1) (1819) 2 B. & Ald. 367.
(2) (1762) 1 W. Bl. 363.
(3) L. R. 1 A. & E. 356.
(4) [1904] P. 60.

Beaverford and not out of the collision: cf. *The Charles le Borgne*, reported in a note to *The Veraston*. (1)

In an action in rem only the wrongdoing ship can be arrested, and the whole trend of Admiralty jurisdiction is to personify the ship and not her owners: see Lord Sumner's observations in *The Susquehanna* (2); and the *Beaverford* is an "innocent" ship. It is of the highest importance to encourage salvors and, in the interests of shipping, *The Glengaber* (3) should be followed and not overruled.

[SCOTT L.J. In *The Hannibal*: *The Queen* (4) it was unsuccessfully contended that the statutory obligation to stand by after a collision took any assistance given out of the category of voluntary services and disentitled the ship standing by to rank as a salvor even if the services rendered were in the nature of salvage; but the decision expressly recognized that to claim salvage those on board the salving ship must not have been in fault for the collision; and no doubts in this respect were expressed by the House of Lords in *The Melanie* (*Owners*) and *The San Onofre* (*Owners*). (5)]

The appellants do not now take the point that the respondents are debarred from raising the issue on the special case by reason of signing Lloyd's salvage agreement and submitting to arbitration.

[Reference was also made to *The August Korff* (6); *The Harvest Home* (7); and *The Sappho*. (8)]

J. V. Naisby and *G. N. W. Boyes* for the respondents were not called on.

GREER L.J. In this case a collision took place between the *Empress of Britain* and the *Kafiristan* on June 16, 1935, in the Gulf of St. Lawrence. The owners of the *Empress of Britain* are also owners of the *Beaverford*, and they were represented at the time of the collision, and the subsequent services rendered by the *Beaverford*, by their agents, the

(1) [1920] P. 15*n*.
(2) [1926] A. C. 655, 664.
(3) L. R. 3 A. & E. 534.
(4) (1867) L. R. 2 A. & E. 53.
(5) [1925] A. C. 246.
(6) [1903] P. 166.
(7) [1904] P. 409.
(8) (1871) L. R. 3 P. C. 690.

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masters and crew of the two vessels. The *Empress of Britain* was by agreement found in fault to the extent of 75 per cent. whereas the *Kafiristan* was only in fault in respect of 25 per cent. If this matter were res integra I should be of opinion that there is no rule of justice whereby it can be said that even a vessel at fault ought not to be able to recover for salvage services. It may well be that a vessel wholly in fault has, at the time that the salvage service commenced, only damaged the other vessel to a very small extent and that by the efforts of the vessel in fault the damage has been confined only to the small extent which existed at the time that the salvage services were commenced. I can understand the view that in these circumstances the owners of the vessel, though in fault, who had by means of exceptional exertions and expenses brought the damaged vessel to safety, ought to have been encouraged by salvage reward in doing that which they were under no obligation to do, their only obligation being under s. 422 of the Merchant Shipping Act, 1894, to stand by and to save life. I think the circumstances might readily be such that a vessel entirely at fault with reference to the collision might very properly be encouraged to render salvage services which would more than wipe out the fault that it had already committed. It does not seem to me, strictly speaking, that that is a case of the owners of a vessel taking advantage of its own wrong. So far from taking advantage of their own wrong, they are trying to set right that which they have done, which was wrong. The position is much stronger in the case of a ship which has only been at fault, since the Maritime Conventions Act of 1911, in a lesser degree, because the vessel which is only in fault in a lesser degree ought to be, one would think, encouraged to do its best to reduce the cost to the owner of the salved vessel by exercising exertions for its safety whereby everybody is benefited, not only the salved vessel but the other vessel that will have to pay a larger proportion of the damage under the Act of 1911.

Before that Act the result, where both were in fault, was that each bore half of the damage; it is only under the Act of 1911, in consequence of an agreement with other

nations, that the Court was entitled to award different proportions.

In my opinion, however, that Act makes no difference to the long accepted rule that in the Admiralty Court a vessel which is either wholly or in part to blame cannot recover in respect of salvage services. I think that is too well settled by a number of cases that have been referred to, beginning with *Cargo ex Capella* (1), and the way in which those cases have been accepted as decided in accordance with sound principles by a number of authorities to which my brother Scott L.J. has referred. They are set out on p. 257 of Temperley's Merchant Shipping Act in these terms : " Salvage. The question whether the statutory obligation to stand by after collision debars salvage is discussed in Kennedy, Civil Salvage, 2nd ed., p. 30. The general rule would seem to be that where the ship standing by is in no way to blame, she may rank as salvor if her services are really of the nature of salvage." *The Hannibal* : *The Queen* (2) ; *The Melanie* (3) ; and *The Beta* (4), are referred to, and the learned author continues : " Where she has been wholly or in part to blame, no claim can be entertained for salvage services rendered. *Cargo ex Capella* (1) ; *The Glengaber* (5) ; *The Duc d'Aumale* (*No.* 2)." (6) The cases to which my Lord has referred show quite clearly, in my opinion, that that has been accepted in the Court of Appeal and in the House of Lords as a rule which has been established in the Admiralty Court. Decisions to which we have been referred necessarily mean that the judges and the learned lords who were deciding those cases did so solely on the ground that the party claiming salvage was an innocent party, and that their decision would have been quite otherwise if the salvor had not been an innocent party but had been in part or in whole responsible for the collision. I personally regret that that is the view that has prevailed, and I should not be sorry to see some statutory provision that would do away with the effect of the accepted decisions on the subject.

(1) L. R. 1 A. & E. 356.
(2) L. R. 2 A. & E. 53.
(3) [1925] A. C. 246.
(4) 5 Asp. M. L. C. 276.
(5) L. R. 3 A. & E. 534.
(6) [1904] P. 60.

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I do not think I need further refer to the authorities except by saying that *The Glengaber* (1), which was much relied upon here, is a very unsatisfactory decision. I cannot myself ascertain from the report whether the liability was confined by the learned judge who decided that case to the owners who were owners of both ships, or whether the liability was decided on the ground that it arose as against all the owners of the ship, whether they were part owners of the vessel that was to blame, or whether they were not part owners of the vessel that was to blame.

In the result I have no doubt that the proposition which I have put forward has been well established and accepted in the Admiralty Court. As regards *The Duc d'Aumale* (*No.* 2) (2), I agree with what has been said by Mr. Hayward, that it did not directly raise the question. Gorell Barnes J. did in fact say that he accepted the decision in *The Glengaber* (1), a decision that a vessel which was wholly to blame for the collision could not recover any salvage. It seems to me that if a vessel which was wholly to blame cannot recover any salvage under any circumstances, then a vessel which was only responsible for half of the damage should be equally in a position of not being able to claim. As I have said, I regret the decision because I cannot help thinking, having regard to the fact that salvage is a voluntary operation upon which a vessel is not bound to engage by any rule of law, it is a matter of regret that vessels are not encouraged, even where they are in fault, to carry on salvage operations.

A great deal has been said in this case about the fact that these were two separate vessels, the salving vessel, the *Beaverford*, although belonging to the same owners, being a different vessel from the *Empress of Britain*, admittedly to blame for the collision to the extent of 75 per cent. and being therefore disentitled to salvage. It seems to me to follow as a matter of course that her owners, as owners of the *Beaverford*, are equally disentitled to claim salvage. It is true that for many years for the purpose of convenience the name of a

(1) L. R. 3 A. & E. 534. (2) [1904] P. 60.

vessel has been treated as the equivalent for the name of the owners of the vessel, but I think that is a mere matter of convenient procedure in the Admiralty Court and to enable the reporter of Admiralty cases to refer to cases by the name of the vessel rather than setting out in full that the litigation was between the owners of vessel A and the owners of vessel B.

For these reasons I am satisfied that the learned judge was right in the decision to which he came. It was the only decision to which he could come, and I think it is the only decision to which we can come, though it is possible that a higher tribunal may consider and revise these cases which have lasted for so long.

For these reasons I think that the appeal should be dismissed.

SLESSER L.J. The principle which is expressed in the maxim "Jus ex injuria non oritur" is of general application. It is stated by Lord Mansfield in *Montefiori* v. *Montefiori* (1) that no man shall set up his own iniquity as a defence any more than as a cause of action, and in civil law, in Pothier's Traité de Droit Civil, vol. 1, p. 186, there is a similar expression, which I mention in case it may be said that the civil rather than the common law is applicable to an Admiralty dispute. In the present case, as my Lord has stated, the vessel which is admittedly the wrongdoer to the extent of 75 per cent. of the blame, the *Empress of Britain*, is owned by the same company, the C. P. R., as the ship which seeks to be remunerated for salvage, namely, the *Beaverford*, and as I read the authorities, which seem to me entirely consistent with the principle which I have mentioned, there is no doubt, at any rate of this, that had the ship which sought to be remunerated for salvage been itself a wrongdoer, that principle would have prevented the ship from recovering on the claim. That is made perfectly clear in *Cargo ex Capella*. (2) Doctor Lushington said, in language which appeals very much to my mind: "I don't seek for authorities, but I look to the principle which ought to govern the case. In my mind the principle is this, that

(1) 1 W. Bl. 363.

(2) L. R. 1 A. & E. 356, 357.

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no man can profit by his own wrong. This is a rule founded in justice and equity, and carried out in various ways by the tribunals of this country, and never, so far as I am aware, departed from by any English Court." That authority was quoted with approval by Gorell Barnes J. as he then was, in *The Duc d'Aumale* (*No.* 2) (1), where he cites in support of the conclusion to which he had there come, that the wrongdoer could not claim remuneration, *Cargo ex Capella* (2), and the language which I have cited.

It is argued that we have to distinguish these cases by reason of the fact that in *The Duc d'Aumale* (*No.* 2) (1) and in *Cargo ex Capella* (2), the wrongdoing ship was itself claiming salvage, whereas here there are two different ships, albeit in the same ownership; and in support of the proposition that each ship shall be so personified that the doctrine to which I have referred shall not extend beyond the wrongdoing ship so as to affect their owner claiming salvage through another ship, certain passages in *The Glengaber* (3) have been relied upon. Sir Robert Phillimore says: "I know of no precedent for saying that because a vessel belongs to the same owner as the vessel which has done the mischief (being wholly unconnected with the act of mischief itself, and there being no suggestion of any conspiracy—which, of course, would create a totally different state of circumstances—no suggestion of any conspiracy between the two vessels, the one to cause the mischief and the other to assist in remedying it), such a vessel cannot recover salvage reward. I know of no case in which such a suggestion has been put forward, and therefore know of no instance in which it has been sustained, therefore I do not uphold it in the present case." There are certain earlier observations which go to indicate that Sir Robert Phillimore was not perhaps in those observations committing himself to the thing which he there seems to state in such general terms, for he limits it above to those who were not joint owners of the ship. That was of course a case of the old system of holding ships by shares and not a

(1) [1904] P. 60.
(2) L. R. 1 A. & E. 356.
(3) 1 Asp. M. L. C. 401; L. R. 3 A. & E. 534.

case of holding by one incorporation. For myself, I agree with Mr. Hayward that if those words are to be treated in their natural terms, perhaps extended beyond the facts of that particular case, they do seem to indicate that Sir Robert Phillimore's view expressed in 1872, was that in the absence of conspiracy, the mere fact that the salving vessel belonged to the same owner as the wrongdoing vessel would not disentitle the salving vessel to an award; and that is said after *Cargo ex Capella* (1) which had already decided in 1867 that where the salving vessel was itself a wrongdoer her owners would be disentitled. I cannot see that what is there said by Sir Robert Phillimore can be supported here upon principle. The principal here, suing as owner of the *Beaverford*, has, in fact, two instruments, one, the *Empress of Britain*, which does the injury, and the other the *Beaverford*, which endeavours to repair it and seeks to charge for that attempt at reparation. I am unable to see, if it be right that the wrongdoer is himself disentitled to claim salvage, what difference it makes that the owner claims salvage through two instruments and not through one instrument, and if there be anything in *The Glengaber* (2) to the contrary—and I am inclined to think there is—then I would say that, very respectfully and very regretfully, I cannot follow that decision.

It follows, therefore, in my view, that this case falls directly within the authority to which my Lord has called attention and is consistent with the later treatment of the matter in the cases to which the Lord Justice has referred arising under s. 422 of the Merchant Shipping Act, 1894, and its predecessors, *Melanie* (*Owners*) v. *San Onofre* (*Owners*) (3), and *The Beta*. (4)

I have only to refer to one other argument of Mr. Hayward, which I understand to be this. It was his contention that by reason of the operation of s. 1 of the Maritime Conventions Act, 1911, which enables a Court to divide the loss in proportion to the degree in which each vessel was in fault, in contradistinction to the earlier rule (which had a long history

(1) L. R. 1 A. & E. 356.
(2) L. R. 3 A. & E. 534.
(3) [1925] A. C. 246.
(4) (1884) 5 Asp. M. L. C. 276.

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to be found in Marsden's Collisions at Sea, 9th ed., at p. 151), that half damage would normally be given when both vessels were to blame, some change had been made in the law which would have the effect of altering the view which the Court might otherwise have taken with regard to *The Duc d'Aumale* (*No.* 2) (1), and the earlier cases. I am unable for myself to understand the contention. Under the earlier law, as I have pointed out, it was always in the power of the Court to apportion the damages, though the apportionment was by half and half. Later, that power to apportion was widened so that, in the language of s. 1 of the 1911 Act, it might be in proportion to the degree in which each vessel was in fault. The alteration in principle, if alteration there was, was one which was made in the 17th century. According to Marsden, there having been only one case in the 16th century where partial damages were given, to distinguish it from the older system of full damages or none, in 1614, says the learned author, was the first sentence for half damages. If any change therefore was made in the system of damages, the change took place, not in 1911 but in 1614, a date which I think is of no assistance to Mr. Hayward in the present case. The appeal fails.

SCOTT L.J. I agree with the judgments that have been delivered and particularly with the view that the application of the rule barring the owners of a vessel in fault causing the casualty which occasioned the need for salvage, from recovering salvage remuneration, is of too old a standing for this Court to call it erroneous. It was indirectly considered by the House of Lords in *Melanie* (*Owners*) v. *San Onofre* (*Owners*) (2), and their Lordships seem to me in effect to have assented to it. If the rule is to be modified judicially, I agree that it must be done by the House of Lords. Whilst expressing this view of the legal position, I do feel that the operation of the rule calls for consideration in the circumstances of modern shipping and of the Maritime Conventions Act, 1911.

(1) [1904] P. 60. (2) [1925] A. C. 246.

Legislation giving the Admiralty judge discretion to give a salvage award in such circumstances, perhaps modified in amount, might be a possible solution. The present decision seems a hardship on the plaintiffs and it may be in the general interest that the rule should be altered. I venture therefore to suggest that the Board of Trade might investigate the whole question.

Appeal dismissed.

Solicitors for the appellants: *Wm. A. Crump & Son.*

Solicitors for the respondents: *Middleton, Lewis & Clarke, for Middleton & Co., Sunderland.*

E. C. M. T.

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Dec. 17, 18, 21.
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Jan. 19.

THE MULBERA.

Shipping—Damage—Lighter loading cargo from steamship—Lighter in charge of owners of steamship—Sinking through unknown cause—Absence of proof of negligence—Onus of proof.

While the plaintiffs' lighter *W.* was loading cargo from the defendants' steamship in the Royal Albert Docks the defendants' servants moved the *W.* to another position, and she was left for the night moored alongside the quay and a little inside the stem and port bow of the steamship. On the following morning the *W.* was found sunk through water having entered her hull from an unknown cause. The plaintiffs failed to establish any positive evidence of negligence, but they alleged that the fact that the defendants had moved and remoored the *W.*, and that she sank, raised a prima facie case of negligence which the defendants could only discharge by proof that the *W.* sank from a cause which they could not have avoided by the exercise of reasonable care :—

Held, that the defendants were not insurers of the *W.'s* safety ; that they had no greater duty than to exercise reasonable care and skill in the handling and management of her ; and that having shown such care and skill they had discharged the burden upon them.

Held further, that assuming that the sinking of the *W.* afforded prima facie evidence of negligence, the defendants' suggestion that the leakage which caused her to sink was due to her condition as an old wooden barge was a reasonable suggestion ; that, having shown a reasonable way consistent with the accident having happened without their negligence, they had shifted the burden of proof back to the plaintiffs to establish that it was the negligence of the defendants which caused the *W.* to sink ; and that accordingly the claim failed.

ACTION OF DAMAGE.

The plaintiffs were the owners of the lighter *William* : the defendants were the British India Steam Navigation Company, owners of the steamship *Mulbera*.

The facts are fully set out in the judgment. Shortly stated, they were that on May 1, 1936, the *William*, a wooden open barge, was lying alongside the quay at No. 28 shed in the Royal Albert Dock well clear of the *Mulbera*. The *William* was then part laden with a quantity of metal which had been loaded from the *Mulbera*, but loading had been suspended for the day. During the afternoon, at a time unknown to

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the plaintiffs, the defendants moved the *William* to a position inside the port bow of the *Mulbera*, where, the plaintiffs alleged, she was liable to be squeezed between the quay and the *Mulbera* and/or other craft in the vicinity, and that during the night she was squeezed and sank.

The defendants denied negligence ; they alleged that they moved the *William* to a safe and proper position ; and that she sank by reason of the fact that she was unseaworthy.

H. G. Willmer for the plaintiffs. The plaintiffs have proved that the *William* was seaworthy ; that she was left by their servants in a safe position and not leaking ; that she was moved by the defendants for their own purposes ; and that she was found sunk in circumstances which are consistent with her having been squeezed. The onus therefore is on the defendants : it is like running into a ship at anchor. They must show all the possible causes one or other of which caused the barge to sink, and show with regard to each of them that the result could not have been avoided : see the observations of Fry L.J. in *The Merchant Prince*. (1) A seaworthy barge does not sink in the ordinary course of events, and that she did so affords prima facie evidence of negligence : *The Princess*. (2) The plaintiffs do not allege trespass, but if the defendants choose to shift a barge without notification to the plaintiffs they have at least the burden cast on them of proving that they used reasonable care. They know the facts and the plaintiffs do not. Even if the principle laid down in *The Merchant Prince* (1) is not applicable, the defendants must at least furnish a reasonable explanation consistent with the sinking having happened without their negligence : see *The Kite* (3), and they have not done so. It was negligent to leave the barge between the quay and the ship where she was likely to be squeezed either by the *Mulbera* or by other craft in the dock.

Owen L. Bateson for the defendants. Before any onus can be cast upon the defendants the plaintiffs must prove that

(1) [1892] P. 179, 189. (2) [1929] P. 287.
(3) [1933] P. 154.

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when they left the barge she was seaworthy; until that is established the burden is on the plaintiffs of proving affirmatively that the defendants were guilty of negligence. Only two serious theories have been put forward: (*a*) the pleaded cause, that the barge was squeezed by the *Mulbera*. If this is not made out the Court is driven to the only other alternative hypothesis, that the barge was unseaworthy.

[BUCKNILL J. My present view is that neither squeezing nor unseaworthiness has been proved; she may have had a blow of some sort.]

If an ordinary bump is enough to sink a barge then she cannot be fit to be in the dock. She was a very old wooden barge, and the reasonable explanation is that the accident happened because, with 38 tons of cargo in her, owing to her condition she leaked and sank. If the defendants give a reasonable explanation of how the accident may have happened without their negligence that is sufficient to shift the onus of proof back to the plaintiffs to establish negligence (*The Kite* (1)) and they have failed to prove it.

Willmer replied.

Cur. adv. vult.

1937. Jan. 19. BUCKNILL J. read the following judgment: In this case the plaintiffs are the owners of the barge *William*. The defendants are the British India Steam Navigation Company, Ld.

The cardinal fact of the case is that the *William*, laden with a cargo of about 38 tons of metal in bags, sank in the Royal Albert Dock off No. 28 shed on the night of May 1 or early morning of May 2, 1936. There is no direct evidence when or why she sank, but the evidence indicates that she sank between 9 P.M. of May 1 and 7 A.M. of May 2. The plaintiffs say that the sinking of the *William* was caused by the negligence of the defendants or their agents. The defendants say that the sinking was not due to any negligence on their part. They also allege that the barge sank because she was unseaworthy.

(1) [1933] P. 154.

The material facts as I find them are as follows: The *William* is a wooden swim-headed barge of 29¾ tons register and 50 tons dead-weight capacity, about 64 feet long and 17 feet beam, with a depth of side amidships about 5 feet 6 inches. On April 29 the *William* arrived off the *Mulbera*, belonging to the defendants, to take delivery of some scrap metal from her. The *Mulbera*, which is 466 feet in length, was lying moored alongside the quay near No. 28 shed in the Royal Albert Dock and was properly and securely moored with her port side hard up against the quay. The plaintiffs' foreman, William Shore, brought the *William* to the ship, and at that time expected to take about 30 tons of metal. There were two parcels of scrap metal in the *Mulbera*, one parcel of 35 tons and a smaller parcel of 7 tons. Of the parcel of 35 tons, 25 tons were loaded in No. 5 hold and the remaining 10 tons were loaded in No. 2 hold. The small parcel of 7 tons was loaded in No. 6 hold. When the *William* arrived, and indeed up to the time when she sank, no bills of lading for either of these parcels had been lodged at the defendants' office. On April 29, 22 tons were loaded into the *William* from No. 5 hold. The *William* was then pushed away to make room for another barge and was made fast to the ship aft. Shore at some time on April 29 was told by a representative of the defendants to put the *William* alongside the quay to finish loading there. Accordingly on that date the *William* was made fast alongside the quay astern of the ship by means of her chain headfast to a bollard on the quay, and stayed in that position until the afternoon of May 1.

There was some conflict of evidence as to conversations between the defendants' agents and William Shore on May 1. [His Lordship set out the evidence and continued as follows:] I find that neither the quay foreman, Sharman, nor McClure, the chief tally clerk, at any time on May 1 said to either Shore or Shore's son that there would be no cargo for the *William* on that day, and I find that Shore was asked to move the barge on May 1, as stated by Sharman.

In the afternoon of May 1 Gardner, a labour master in the employ of the defendants, told a man called Lambe, also in

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the employ of the defendants, to move the *William* to the forward end of the ship to take cargo which had already been put on to the quay, and the *William* was moved up in charge of two men in the employ of the defendants and was made fast alongside the quay heading to the eastward and in such a position that her port forward quarter was inside the stem and port bow of the *Mulbera* and between the ship and the quay.

Loading into the *William* of bags of metal then started about 4 P.M., and, after 180 bags of metal had been loaded into her, discharge ceased about 4.40 P.M. The weight of these bags amounted in all to about 16 tons, so that the *William* now had on board a total cargo weight of 38 tons. The loading of the *William* was done by the defendants' agents. After work was knocked off the barge was made fast by means of a single rope from her bows to a bollard on the quay. The man who made her fast described it as a short line made fast to a cleet on the quay and to some part of the barge which he was unable to specify. There was no reliable evidence that she was made fast aft after the loading ceased.

About 5.30 P.M. on May 1 Gardner went on board the *William* and found the barge lying alongside the quay in such a position that her port forward end was about 6 feet inside the stem and port bow of the *Mulbera*. The barge at that time appeared all right and had apparently about 2 feet 6 inches freeboard. There was about 10 feet of water between the ship and the barge. A large empty barge was lying head to the quay about 15 to 20 feet from the stern of the *William* with another barge made fast to her aft.

Nothing more is known about the *William* during the next fourteen hours, but about 9 P.M. a barge, which was probably the *William*, was seen by the second officer of the *Mulbera* lying in a position similar to that given by Gardner, to which I have already referred. At about 7 A.M. on May 2 it was discovered that the *William* had sunk. The *William* was raised by the Port of London Authority on the same day. When about to be raised she was found nearly parallel to the quay in about 30 feet of water with 8 to 10 feet of her forward

part under the stem of the *Mulbera*. The *Mulbera's* draft at that time was about 19 feet forward. There is a mud bank at the foot of the quay down which the barge would probably slip after she sank.

This appears to be the substance of the material facts relating to the casualty itself as I find them.

It was argued by Mr. Willmer, on behalf of the plaintiffs, that as the defendants had elected to move the *William* the burden was on them to satisfy the Court that they had not been negligent in any way which could have caused or contributed to her loss. Mr. Willmer argued that the sinking of the barge raised a prima facie case of negligence against the defendants, and that they could only escape liability by showing what was the cause of the loss and by showing that the result of that cause was one which could not have been avoided by them, or by showing all the possible causes, and with regard to every one of these causes that the result could not have been avoided by them by the exercise of reasonable care on their part. He relied on the judgment of the Court of Appeal, and more especially on the judgment of Fry L.J. in *The Merchant Prince*. (1)

Mr. Willmer also relied on *The Princess* (2) as showing that the sinking of the barge raised a prima facie case of negligence against the defendants. He also referred to *The Kite* (3), and argued that even if the principle laid down in *The Merchant Prince* (1) did not apply the burden was on the defendants of proving that the sinking was not caused by their negligence and that the burden was only discharged if they provided a reasonable explanation of the loss without any negligence on their part. Mr. Willmer said, and, in my view, rightly said, that he did not contend that the defendants in moving the barge alongside the quay on May 1 were doing an act which in itself was an infringement of the plaintiffs' rights.

I have now to consider whether the defendants were negligent in any way, and in particular whether they were negligent in

(1) [1892] P. 179, 189. (2) [1929] P. 287.
(3) [1933] P. 154.

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making the *William* fast in the position in which they did, and in leaving her unattended and without giving notice to the plaintiffs of her position. And I have also to consider the question whether the fact of the sinking of the barge in itself raises a prima facie case of negligence against the defendants and, if so, whether they have discharged that burden.

The main attack made by the plaintiffs on the defendants' method of dealing with the barge was that she was placed in an unsafe position between the ship and the quay in that she was liable to be squeezed between the quay and the *Mulbera* or between the quay and other craft which were lying in the vicinity. It was alleged on behalf of the plaintiffs in support of this attack that the *William* when raised showed positive signs of having been squeezed, and in particular that her top sides were set in to the maximum of $3\frac{1}{2}$ inches amidships. I have considered this question with the Elder Brethren. My view, which agrees with their advice, is that the setting in of the *William's* top sides and her other damage do not prove that she was squeezed. The Elder Brethren advise me that this damage would probably be caused when the barge with her cargo in her was raised by wires.

I accept the evidence of Gardner, who gave his evidence well and impressed me as a reliable and trustworthy witness, as to the position of the barge when he went on board her on the evening of May 1. I also accept the evidence of the second officer and of the quartermaster of the *Mulbera* as to the number and position of the ship's moorings and that they remained tight throughout the night of May 1 and that the position of the ship's gangway remained the same. The Elder Brethren advise me that on these facts the *Mulbera* was properly moored and that it would be impossible for the *Mulbera* to move more than a few inches. They also advise me that it was not improper to moor and leave a barge of normal strength inside the bow cavity of the *Mulbera* and between her and the quay in the position deposed to by Gardner.

I have also asked their advice whether it was negligent to

moor the barge to the quay with one rope forward and they advise me that this was not improper. Neither do the Elder Brethren consider it unusual or improper to leave the barge unattended during the night inside the cavity of the *Mulbera's* bows, if the ship was properly moored. On this advice, with which I agree and adopt, I also hold that the defendants were not to blame for omitting to tell the plaintiffs of the position in which they had left the barge on the night of May 1. In my judgment, the plaintiffs have failed to establish any positive negligence by way of act or omission against the defendants.

The question was much debated as to the condition of the barge and whether she was in a fit state to take on board and bear the burden of 38 tons of metal without leaking to any material extent. It is clear that the *William* sank because water got into her hull after discharge had ceased for the night. There was no heavy rain during the night, and it is not suggested that water was pumped into her from the quay or from any other craft, and therefore presumably the water which caused her to sink entered from the dock through a hole or holes in her bottom or sides.

Was that hole or holes caused by physical contact with some external object, or was it caused by some defect in the wooden structure of the barge, or did both these causes operate? In my judgment, and, I may say that, although the decision is mine alone, it agrees with the view of the Elder Brethren on the evidence placed before the Court, it is impossible to say what was the cause of the leakage. The *William* may have been forced against the quay by some other moving tug or barge, or she may have started to leak from decay or defect of some under-water part of her structure. The *William* is an old barge, fifty years old, bought for 20*l.* in 1925 by the plaintiffs, who then spent 225*l.* on a general overhaul and sheathing of her sides. Since then she has had minor repairs executed on her, and in 1934 the last substantial repair was done, amounting to 40*l.* She was carrying cargoes up to the time of her loss, including the following: 40 tons scrap metal on February 4, 1936; 35 tons cases of grapefruit on April 25, 1936.

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In my view, it is quite a probable explanation of the sinking of the *William* that she started to leak from decay or defect in her hull, which may have been contributed to by contact with the quay wall owing to the pushing of other craft against her.

What, then, is the legal position? Here is a barge which sinks for some reason which has not been ascertained. Are the defendants liable for the loss? It appears to me that they would not be liable unless the fact that they moved and moored the barge on May 1 raises a prima facie case of negligence against them which they can only discharge by proof that the barge sank from a cause which they could not have avoided by the exercise of reasonable care.

The defendants took charge of the barge and were bound to exercise due care in the handling and management of her, but they did not become insurers of her safety, and the question for my decision appears to be whether they avoid liability for her loss if they show they have exercised proper care in their handling of her, and the Court has to guess, if it can, what was the reason which caused her to sink. No case has been brought to my notice which shows that the defendants in such circumstances as these have any greater duty than to exercise reasonable care and skill in the handling and management of the barge, and my view is that, having established that they did show such care and skill, they have discharged the burden and are not liable to the plaintiffs for the loss.

If I apply to this case the presumption which Hill J. applied in *The Princess* (1), and if I assume that the sinking of the barge is prima facie evidence of negligence on the part of the defendants, the burden is then cast on them of proving that they were not negligent. By what means do they discharge that burden? To discharge it must they prove the actual cause of the loss, and that they are not responsible for that cause, or do they discharge it by proving a reasonable and probable cause and that they are not responsible for that cause?

The decision of Langton J. in *The Kite* (2) is helpful to me

(1) [1929] P. 287. (2) [1933] P. 154.

in answering these questions. That decision is based on Lord Dunedin's speech in *Ballard* v. *North British Ry. Co.* (1) Lord Dunedin said: "I think this is a case where the circumstances warrant the view that the fact of the accident is relevant to infer negligence. But what is the next step? I think that, if the defenders can show a way in which the accident may have occurred without negligence the cogency of the fact of the accident by itself disappears, and the pursuer is left as he began—namely, that he has to show negligence. I need scarcely add that the suggestion of how the accident may have occurred must be a reasonable suggestion."

In the present case I have come to the conclusion, after hearing all the evidence, that it is a reasonable and probable suggestion that the leakage which caused the *William* to sink was due to her condition as an old wooden barge. That is no more than a suggestion of a probable cause of her loss which, on the evidence, I think is reasonable. It appears to me a much more reasonable suggestion than the suggestion that she was squeezed between the *Mulbera* and the quay by movement of the *Mulbera*.

There is another probable factor to consider. Some other craft may have pushed against the *William*, pressing the *William* against the quay or against the *Mulbera* and doing damage to her and causing her to leak to such an extent that she eventually sank. The Elder Brethren advise me that when ships are moving about in this dock the barges lying in the dock get a considerable amount of buffeting and pressure in the ordinary course of their work, and that a barge which uses this dock must be strong enough to withstand such treatment.

After hearing all the evidence I have grave doubts whether the *William* was fit for any such treatment. On the assumption to which I have referred, that the sinking of the *William* raises a prima facie case of negligence against the defendants, I think that the judgment of Langton J. in *The Kite* (2) is apt to this case where he said: "What [the defendants] have to do is to give a reasonable explanation which, if it be

(1) 1923 S. C. (H. L.) 43, 54. (2) [1933] P. 154.

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accepted, is an explanation showing that it [the accident] happened without their negligence. They need not even go so far as that, because if they give a reasonable explanation which is equally consistent with the accident happening without their negligence as with their negligence they have again shifted the burden of proof back to the plaintiffs to show—as they always have to show from the beginning—that it was the negligence of the defendants that caused the accident."

For these reasons I hold that the plaintiffs have failed to establish their claim against the defendants and that it must be dismissed.

Solicitors for the plaintiffs: *Keene, Marsland & Co.*
Solicitors for the defendants: *Thomas Cooper & Co.*

E. C. M. T.

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Shipping—Collision—Vessel leaving dock—Orders and directions of dock-master—Contributory negligence—Common law rule—Division of loss—Maritime Conventions Act, 1911 (1 & 2 *Geo.* 5, *c.* 57), *s.* 1; *s.* 9, *sub-s.* 4—*Mersey Dock Acts Consolidation Act*, 1858 (21 & 22 *Vict. c. xcii.*), *s.* 49—*Costs.*

By s. 1 of the Maritime Conventions Act, 1911, where by the fault of two or more vessels damage has been caused to one or more of those vessels, the liability to make good the damage shall be in proportion to the degree in which each vessel was in fault; and by s. 9, sub-s. 4, the Act applies "to any persons other than the owners responsible for the fault of the vessel as though the expression 'owners' included such persons."

By s. 49 of the Mersey Dock Acts Consolidation Act, 1858: "Any harbour-master, dock-master, or pier-master may direct the time and manner of any vessel coming into or going out of any dock . . . . and if the master of any vessel shall act contrary to the directions or neglect to obey the orders of such harbour-master, dock-master, or pier-master, in relation to the manner of coming into or going out of such dock . . . . such master shall for every such offence be liable to a penalty of not exceeding 20*l.*"

The plaintiffs, the owners of the *K. O.*, sued the defendants, the owners of the *R.*, for damages arising out of a collision between the *K. O.* and the *R.* near the entrance to the Princes Half Tide Dock in the River Mersey. The owners of the *R.* pleaded that the *R.* had been ordered to leave the dock as and when she did by the officials of the Mersey Docks and Harbour Board. The plaintiffs thereupon added the Dock Board as defendants.

The *K. O.* was lying at Princes landing stage, River Mersey; the *R.* was in the Princes Half Tide Dock, which is a little lower down the river than the landing stage.

Bucknill J. found on the facts that the *K. O.* left the stage before the *R.* was directed by the harbour-master to come ahead into the entrance, and absolved the *K. O.* from blame, but held both the *R.* and the Dock Board to blame on the ground that the employees of the Dock Board were co-operating with the master of the *R.* in bringing the *R.* out of dock into the river and did so at a time when, if either of the defendants had had a better look-out, they would have seen that the *K. O.* had started away from the stage. He accordingly gave judgment for the *K. O.* against both defendants and dismissed the counter-claim of the *R.* against the Dock Board on the ground that the common law rule as to contributory negligence, and not the maritime rule of division of loss, applied.

On appeal:—

Held, (i.) That the *K. O.* was to blame for a bad look-out and for leaving the stage as and when she did, which (per Scott L.J.) was at or about the same time as the *R.* began to come ahead

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through the entrance; that the *R.* was also to blame because, after the direction to come ahead had been given, if she had been keeping a good look-out she would have seen the approaching *K. O.* and ought to have stopped her way and remained in the entrance; and that the proportion should be two-thirds to the *K. O.* and one-third to the *R.*; (ii.) (per Slesser and Scott L.JJ.) that the directions of the dock-master were orders within the meaning of s. 49; but (iii.) (per Greer and Scott L.JJ., Slesser L.J. dubitante) that the employees of the Dock Board at the time the direction was given were not negligent. (iv.) If, however, there was any negligence on the part of the Dock Board, (per Curiam) that the rule as to division of loss provided for in the Maritime Conventions Act, while applicable as between the *K. O.* and the *R.*, did not apply to the Dock Board, and that, both the *K. O.* and the *R.* being negligent, on the application of the common law rule, the Dock Board would be entitled to judgment.

Per Scott L.J.: That, the ordinary rule unless there is reason to depart from it, should be that costs should be divided in the same proportion as the liability.

APPEAL and CROSS-APPEAL from a decision of Bucknill J. in an action of damage by collision.

The plaintiffs (respondents) were the owners of the steamship *King Orry*; the defendants were respectively the owners of the steamship *Rockabill* and the Mersey Docks and Harbour Board (hereinafter referred to as "the Dock Board"). The collision took place on the afternoon of September 17, 1935, off the entrance to Princes Half Tide Dock in the River Mersey. There was a gale of wind from the W. N.W.; the weather was clear but squally, and the tide flood with the force of about three knots.

The *King Orry*, a twin-screw steamship of 1877 tons gross, was on a passage from Princes landing stage to an anchorage in the Sloyne, a little higher up the river than the landing stage, but being held hard against the stage by the gale on her port side, was proceeding at full speed down the river to extricate herself. The *Rockabill*, a single-screw steamship of 1392 tons gross, according to the defence had squared up for the northern entrance of the Princes Half Tide Dock and was awaiting the orders and directions of the dock officials to proceed out into the river. The pleaded case of these defendants was that the dock-master ordered the *Rockabill* to let go her bow rope and come ahead, and that as she emerged into the river the *King Orry* was leaving the northern end

of the Princes landing stage, about 500 feet distant, and proceeding at high speed, and that almost immediately the vessels collided, the stem of the *King Orry* striking the port side aft of the *Rockabill*. These defendants and the plaintiffs (by their amended statement of claim) alleged that the Dock Board ordered the *Rockabill* to come ahead at an improper time. In the defence of the second defendants, the Dock Board, allegations of negligence were made against both the plaintiffs and the first defendants, and it was alleged that the dock-master ascertained that all was clear to the north, and so informed the master of the *Rockabill ;* that the *King Orry*, which was then lying stationary at the landing stage, subsequently sounded a long blast ; and that the *Rockabill* continued on into the river and the *King Orry* came ahead at high speed.

BUCKNILL J., in a considered judgment, said that he thought the crucial question was whether the *King Orry* got under way before the *Rockabill* started ahead from the Princes Half Tide Dock into the entrance. He had come to the conclusion that when the *King Orry* cast off from the stage the *Rockabill* was still in the Half Tide Dock and was about squared up for the northern entrance and practically stationary. The initial blame, therefore, lay on the *Rockabill* for coming out into the river at an improper time. The *King Orry* had sounded a prolonged blast before and after leaving the stage, and the *Rockabill* also sounded a prolonged blast about the time of the *King Orry's* second blast. Neither vessel heard the blasts of the other, but having regard to the gale of wind he did not found his judgment on any failure of either vessel to hear these signals. If those on the *King Orry* had been watching the *Rockabill* carefully in the Half Tide Dock they would have observed earlier than they did that she was in fact coming ahead into the entrance. But he did not think that if they had done so they would be to blame for continuing on at full speed as they did. Once they had got under way they were justified in carrying out their manœuvre, which required the full power of their engines, and they were justified in expecting the *Rockabill* not to hamper their

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manœuvre by an unnecessary and improper exit into the river across the course of the *King Orry*. The *Rockabill*, therefore, was alone to blame for the collision.

[His Lordship continued as follows :] " A more difficult question, as it seems to me, arises as to the legal position of the Dock Board in this matter.

It was argued on behalf of the *Rockabill* that the dock-master ordered the ship to come out into the river, and that her master was bound to obey such order by virtue of the provisions of s. 49 of the Mersey Dock Acts Consolidation Act, 1858, which are set out in *The Sunlight*. (1) It was said on their behalf that if the master carried out an order of the dock-master which he was bound to obey, not only would the owners of the *Rockabill* be exempt from liability in personam for damage caused by the obedience of her crew to such an order, but also the *Rockabill* would be exempt from liability in rem for damage caused by the *Rockabill* through compliance with such an order. It is not necessary for me to consider the question of the liability of the *Rockabill* in rem in such a case, for I am satisfied that no such order was given. The order to ' come ahead ' was not a peremptory order to go full speed ahead at once into the river and was not taken as such by her master. The material facts so far as the Dock Board are concerned in this case are shortly these. Mr. Bingham, the experienced dock-master of the Waterloo system of docks, was in charge of the work of undocking the *Rockabill*. He had to assist him, amongst others, a man called Stafford, also an experienced employee of the Board. In 1930 Bingham had issued certain instructions to his subordinates at this dock, and these instructions were, as I find, drawn to the attention of the master of the *Rockabill* and known by him. The instructions were also well known to Stafford. They were as follows :—

' When vessels are in the River Entrances, and about to enter the river, the officer in charge of the entrance should let the master know if the river is all clear north (as the official residences prevent those on board from seeing north)

(1) [1904] P. 100.

and if it is not clear, what is in the way, and its position. If asked about the southern area they should inform them that they can see south better themselves. They should not order a ship into the river unless absolutely necessary, leaving that to the discretion of the master, unless it is seen that the master is going to create a risk of collision by going out, when he should be ordered to bring his ship up in the gateway until such risk ceases to exist.' "

The conclusion to which he had come, his Lordship said, was that if Stafford had been keeping a good look-out he would have seen that the *King Orry* was moving from the stage about the time when he made his report " All clear north " and would have reported that fact to Bingham, and the question arose whether the employees of the Board owed a duty to the *King Orry* to take reasonable care not to allow the *Rockabill* to come out into the river at an improper time. In his view the employees of the Dock Board were co-operating with the master of the *Rockabill* in bringing the vessel out of dock into the river.

" Owing to this failure of duty on the part of Stafford, and owing to the failure on the part of Bingham to notice the movement of the *King Orry* himself, or owing to the determination of Bingham to undock the *Rockabill* regardless of the manœuvres of the *King Orry*, Bingham told the *Rockabill's* master to come ahead with her and directed the bow rope to be cast off, and in compliance the *Rockabill* did come ahead. In doing this Bingham was in my judgment negligent in the performance of his part of the operation of undocking the *Rockabill* and his negligence contributed to the collision. On the other hand the master of the *Rockabill* knew that he was expected to look out for vessels coming from the southward himself ; and he knew of Bingham's instructions in 1930 and the practice in this dock, and he was not bound to obey the direction of the dock-master to come ahead if he thought it more prudent to stay where he was. Neither did the direction to come ahead in my view relieve the master of the *Rockabill* from the duty of himself keeping a good look-out, nor did it require him to go at full speed ahead from the

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time when the order was received until the collision or until it was inevitable. In the result I think that both the crew of the *Rockabill* and the employees of the Dock Board were negligent; that their negligence contributed to the collision; and that through them their employers are both liable to the owners of the *King Orry* for the damage sustained by her in the collision that resulted from their negligence.

The last question is whether the owners of the *Rockabill* can recover their damage from the second defendants, the Dock Board. In my judgment they cannot do so, for as between them and the Dock Board the rule of the common law and not the rule of the maritime law as embodied in s. 1 of the Maritime Conventions Act, 1911, applies. The rule of the common law, as I understand it, is that in such a case as this, where the claimants have themselves been guilty of negligence contributing to their own damage, the loss lies where it falls, and they cannot recover from their co-tortfeasors.

I therefore give judgment for the plaintiffs against both the defendants, and I dismiss the counterclaim of the first defendants against the second defendants."

The Dock Board and the owners of the *Rockabill* appealed. The appeal was heard on December 8, 9, 10, 11, 14 and 15, 1936.

R. K. Chappell K.C. and *E. W. Brightman* for the Dock Board. [Only those portions of the arguments which are material to the legal position of the Dock Board are reported.] There is no case against the Dock Board, which owed no duty to the *King Orry* a breach of which could be actionable. The dock officials did not take the responsibility of ordering the *Rockabill* out; their only duty was to see that all was clear to the north; and the learned judge did not find that the direction "Come ahead with her" was a mandatory order, it was merely permissive, and neither taken nor intended as an "order" under s. 49 of the Mersey Dock Acts Consolidation Act, 1858. Indeed, the dock officials were not bound to order the *Rockabill* to remain where she was even if they knew that the *King Orry* was leaving the stage.

On the facts, however, both the *Rockabill* and the *King*

Orry were negligent, and even assuming (contrary to the Dock Board's contention) that the direction to come ahead was an order, it must be carried out in a seamanlike way. Even if it was a negligent order there was an intervening act of negligence on the part of the *Rockabill* in continuing on into the river and failing to bring herself up, and that is sufficient to entitle the Dock Board to judgment, for the common law rule and not the Admiralty rule as to division of loss is applicable.

[Reference was made to *The Sunlight.* (1)]

Lewis Noad K.C. and *R. E. Gething* for the owners of the *Rockabill.* The *King Orry* had no right of way over the *Rockabill* and was grossly negligent in coming away from the stage as she did, at a time when she could have seen, if she had any look-out, that the *Rockabill* was moving in the dock towards the entrance.

[SCOTT L.J. referred to *The Llanelly.* (2)]

The *Rockabill* was not negligent, but, if there was any negligence, it was solely that of the Dock Board in ordering her to come ahead and casting off the check ropes. The Dock Board control the whole of the area, including the landing stage, and all vessels at those premises must obey the orders and directions of the dock officials.

F. A. Sellers K.C. and *H. I. Nelson* for the respondents. The *King Orry* was not to blame. She left the stage at a time when the *Rockabill* was stationary and there was no reason for anticipating that she would come out into the river. There is a high duty on those responsible for bringing vessels out of dock into the river: *The Llanelly* (2); *The Hjortholm* (3); it is not the duty of a look-out on a vessel in the river to observe a vessel coming through a dock: *The Calabar.* (4) Both the *Rockabill* and the Dock Board were to blame; they were engaged in the common enterprise of undocking the vessel and did it negligently, and both are liable for the damage to the *King Orry;* see *The Koursk.* (5)

(1) [1904] P. 100.
(2) [1914] P. 40.
(3) (1935) 53 Ll. L. R. 278.
(4) (1868) L. R. 2 P. C. 238.
(5) [1924] P. 140.

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The directions of the harbour-master were clearly orders within the meaning of s. 49 of the Dock Board's Act, and the *Rockabill* had to obey them: *Taylor* v. *Burger* (1); *The Bilbao.* (2) But equally she had to take proper precautions herself: see *The Cynthia* (3); *The Excelsior.* (4)

[SLESSER L.J. referred to *Reney* v. *Magistrates of Kirkcudbright.* (5)]

If, however, the *Rockabill* is exonerated because she had to comply with the orders of the dock officials, the *King Orry* can still recover against the Dock Board even if it be held that the *King Orry* was partly to blame, because the Maritime Conventions Act applies and not the rule of the common law. By s. 1, where by the fault of two or more vessels damage has been caused to one or more of those vessels the liability to make good the damage shall be in proportion to the degree in which each vessel was in fault, and by s. 9 (iv.) the Act applies "to any persons other than the owners responsible for the fault of the vessel as though the expression 'owners' included such persons." Notionally the Dock Board's interference was so effective that they were in control and "responsible for the fault of the vessel," and if the *King Orry* is to blame at all the large preponderance of the blame should be attached to the Dock Board.

[Reference was also made to *Powell and Wife* v. *Streatham Manor Nursing Home.* (6)]

Noad K.C. replied for the *Rockabill.*

Chappell K.C. in reply for the Dock Board. If the *King Orry* was to blame, she cannot recover against the Dock Board, and if the *Rockabill* was to blame the Dock Board officials were not in charge of her navigation. In either event contributory negligence is a good defence.

GREER L.J. This is an appeal by the owners of the *Rockabill* against the findings of Bucknill J., in which he absolved the *King Orry* from any blame for the collision between the two

(1) (1898) 8 Asp. M. L. C. 364.
(2) (1860) Lush. 149.
(3) (1876) 2 P. D. 52.
(4) (1868) L. R. 2 A. & E. 268.
(5) [1892] A. C. 264.
(6) [1935] A. C. 243, 254.

vessels, and an appeal by the Dock Board against his finding that they could be made responsible to the *King Orry* for the results of the collision.

The two ships were of a different calibre: the *King Orry* was a fast and powerful vessel with twin screws capable of easy manœuvring; the other vessel was about the same size but with a single screw and not capable of the same power of manœuvring. I accept the learned judge's conclusion that, as a matter of credit he was, having seen the witnesses, entitled to pay more attention to the evidence given on behalf of the plaintiffs than to that which was given on behalf of the defendants; but the conclusion that we have all come to is that, upon the evidence given by the plaintiffs' witnesses, it is plain that there was very serious fault on the part of the *King Orry*. We also think, having regard to the advice we have received from our assessors, that some blame was also to be attached to the *Rockabill*, and in the result we have come to the conclusion that the proportion of blame should be as two to one—two to the *King Orry* and one to the *Rockabill*.

I will take first the case for the *King Orry*. [His Lordship dealt with the facts and said that there was a bad look-out on the *King Orry* both at the time when she started away and afterwards, and that her master ought to have anticipated that there was a risk of collision if he went ahead without observing that the *Rockabill* was shaping to go into the river. His Lordship continued as follows:] So much with regard to the *King Orry*. With regard to the *Rockabill*, I think there are admissions in the evidence given by her captain and mate which lead me to the conclusion, even if we had not had advice on the subject, that the *Rockabill* was not justified in going ahead through and out of the channel into the river. We have had the assistance, on this part of the case, of our assessors, and they see no reason to say that the *Rockabill* could not have pulled up in the outer entrance of the channel. By the time she reached the outer entrance she would only be travelling at the rate of three knots, and the dock-master and the man behind him who were following

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up were, in my opinion, in a position to take a rope, if a rope was thrown ashore, or if the *Rockabill* asked to have a rope. We are also advised that there would have been no real danger to the *Rockabill* in putting her engines astern at that time, and therefore there was no reason why she should not have pulled up and so avoided the collision. Instead of doing that her master accepted the invitation which was thrown out to him by the mate on the *King Orry* to come ahead as fast as he could in order that the blow—if blow there should be—would be lessened. Under these circumstances we think that the *Rockabill* also was partly to blame for the collision that happened. Both vessels were keeping an inadequate look-out ; both vessels did not realize the danger until it was impossible to avoid it ; and both vessels, in our judgment, are liable for the consequences of the collision.

With reference to the conduct of the Dock Board officials, my own view is that there was no negligence on their part at all, but that is a matter of comparative unimportance having regard to the fact that, if there was contributory negligence on the part of the two vessels, that, at common law, would relieve the Dock Board of the consequences of negligence. The reason why I say that I think there was no negligence is this : the officials of the Dock Board could only see to the north at the time when the order was given to the defendants' vessel to come on, and, having regard to the conversation which the learned judge found had taken place between the master of the defendants' vessel and the dock-master, the order was what I call a conditional order—namely, that they should come ahead, keep a proper look-out at the same time, and, if there was any danger towards the south and the west, they should take such measures as would be necessary to save the situation. But, as they failed to do that, the responsibility is upon them, and not upon the Dock Board.

The result is that the *King Orry* must be held to blame, and the *Rockabill* must also be held to blame in the proportions above stated ; and the Dock Board succeeds in their appeal.

SLESSER L.J. I am of the same opinion. I do not find it necessary to add anything to what my Lord has said about the liability of the *King Orry*. I do feel it right to say that while I have come to certain conclusions which lead to the same results as those stated by my Lord with regard to the *Rockabill*, I proceed upon a slightly different line. In my view, the finding of the learned judge that Bingham said "Come ahead" to the *Rockabill's* master did constitute a direction to him to come ahead within the meaning of the Mersey Dock Acts Consolidation Act, 1858, s. 49, which provides that "any harbour-master, dock-master, or pier-master may direct the time and manner of any vessel's coming into or going out of any dock," more particularly when it is found that that direction to come ahead was accompanied by an order that the bow rope should be cast off. It is true that the evidence goes to show that the dock-master had said "All clear north," but it must be remembered that his case was that he only said "All clear north" and did not say "Come ahead with her"—on which the learned judge has found in favour of the story of the master of the *Rockabill*, that Captain Bingham did use that phrase. Having used that phrase, coupled with the order to cast off the rope—even after he had been asked by one or two of the seamen whether he really meant that the rope should be cast off entirely, and he said yes—that constitutes in my mind a direction. I do not quite understand the distinction which the learned judge makes in his judgment between an order which he calls peremptory and an order not so peremptory. I think that this is a clear direction within the meaning of the regulation which, in accordance with the decision in *The Bilbao* (1), the master had, under compulsion of statute, to obey.

Had the matter remained there I should have found it very difficult to see how the *Rockabill* could have been held responsible for coming ahead as she was directed. *Reney* v. *Magistrates of Kirkcudbright* (2) makes it quite clear to my mind that when a direction is given it is not for the master to whom the direction is given to criticize or consider it.

(1) Lush. 149. (2) [1892] A. C. 264.

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It is his business to obey. That is also clearly stated in *Taylor* v. *Burger* (1)—the case of the *Talisman*—where the Earl of Halsbury L.C. said: "I adhere to what I said in the case of *Reney* v. *Magistrates of Kirkcudbright* (2) that if it were once supposed that a person acting under the orders of a harbour-master is to exercise his own judgment whether or not the harbour-master's orders are most consistent with prudence, and then refuse to obey the order given, that would lead to very serious consequences indeed." But we have to consider what was the order given. The order given was to come ahead, and between the time the order was given and the time when the stem of the vessel was emerging into the open river (when the effects of wind and tide would have made it impossible for her to have arrested her course) it was practical, had a proper look-out been kept, to have put the engines astern, and put a rope ashore, there being a man walking along, as the evidence shows, ready to act upon that manœuvre. It is therefore not because I think that the order originally given was not a direction which would have to be obeyed, but because, after that order had been given, there remained the duty to keep a good look-out, and the failure to keep that good look-out resulted in an accident which might have been avoided that I hold the *Rockabill* blameworthy. During that short interval of time when the vessel was passing along the remainder of the channel we are advised by our assessors, and I agree, that the failure during that time—it cannot have been much more than a minute—to keep a proper look-out during the passage through the channel amounted to some negligence on the part of the *Rockabill*. It is because I think that that negligence was comparatively slight that I agree in the proportions of blame which are suggested in this case, fixing the greater liability upon the *King Orry* which, as my Lord says, showed a complete negligence in the matter.

It only remains to say that having come to the conclusion that both vessels were negligent, the question of the liability of the Dock Board does not arise at common law. Putting

(1) 8 Asp. M. L. C. 364. (2) [1892] A. C. 264.

it that way as an economy of statement I do not propose to discuss matters which, in the result, have proved to be irrelevant. But in so far as I agree with the opinion indicated on the matter I would say that, speaking for myself, I am not satisfied that, had the matter been closely investigated, the Dock Board would necessarily have been acquitted of all liability for negligence. That is my personal opinion, but it is not necessary in the circumstances to say more, and I agree in the judgment which has been given by my Lord.

SCOTT L.J. I agree, and will limit my observations to what the learned judge calls the " crucial " question. I agree with him in so describing it. He says : " These being the material facts as regards the navigation of each ship, the question now arises as to which of them is to blame. It appears to me that the crucial question in the decision of the case is whether the *King Orry* got under way before the *Rockabill* started ahead from the Princes Half Tide Dock entrance. On that question after weighing and considering all the evidence I have come to the conclusion that when the *King Orry* cast off from the stage the *Rockabill* was still in the Half Tide Dock and was about squared up to the northern entrance and was practically stationary. I have come to this decision because I accepted the evidence called for the plaintiffs." Mr. Nelson, for the *King Orry*, very rightly put his finger on that passage as the best piece of the judgment for his case, and urged us to follow the principle laid down in *Powell and Wife* v. *Streatham Manor Nursing Home* (1), and particularly the passage in Lord Wright's judgment, where he has pointed out that where the trial judge has had an opportunity of forming an opinion as to the credibility of the witnesses on a matter in which that credibility was vital and had come to a decision, the Court of Appeal should not reverse the learned judge, other things being equal. We, of course, accept that principle and anything I say is intended only to be consistent with it. [His Lordship analysed the evidence and continued as follows :]

In my opinion the learned judge had no evidence from

(1) [1935] A. C. 243, 254, 264.

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the plaintiffs upon which he was entitled to say that the *Rockabill* was still in the Half Tide Dock, and only about squared up for the northern entrance. I think the only possible conclusion from the whole of the evidence is that the two vessels started at just about the same time. When I say "started," I mean when the *King Orry* cast off her bow rope, and when the *Rockabill* cast off her bow rope. That being so, the whole basis of the learned judge's assumption of fact, in my opinion, goes. He says: "If those on board the *King Orry* had been watching the *Rockabill* carefully in the Half Tide Dock they would have observed earlier than they did that she was in fact coming ahead into the entrance. But I do not think that if they had done so they would be to blame for continuing on at full speed as they did." Now that, in my view, is a complete non sequitur, unless it is understood as meaning that the *King Orry* started appreciably before the *Rockabill* got into the Half Tide Dock, and had got to the point of going full speed with her engines towards the north before the *Rockabill* started, having thrown off her bow rope under the orders of the dock-master.

In my view, for the reasons given by my Lord, and with the additional reasons that I have given on the details of the evidence, the true view is that the two vessels started at the same time. I agree entirely with what both my Lords have said as to the bounden duty of the *King Orry* to have had a good look-out and to have made sure that there was nothing coming out of the Princes Half Tide entrance before they started at all. Ex hypothesi the master knew perfectly well that when he did start he could not stop; that the only way of getting away from the landing stage with safety to himself and the stage was to go absolutely full speed with his powerful engines. He knew that he had got a gale of wind on his port beam, and he knew that he would have to starboard the vessel slightly with helm and propeller action, and that that would necessarily take him near to the entrance of the Princes Half Tide Dock. He knew further that once having got out he had got to go through with it, and that it would be impossible for him to stop because he would have run a very

serious risk of his ship being thrown on to the jetty and doing worse damage both to himself and to others. That being so it was his bounden duty, on those facts alone, to assure himself that there was nothing coming out. In addition to that we must take it that he was aware of the fact—as seems to be the case—that there was no system of communication between the pier head and the north quay of the Princes Half Tide entrance.

It is not for a Court of law to indicate the way in which an authority like the Dock Board should carry out the executive discretion reposed in it by Parliament under its Act, but I do feel very strongly that by reason of the close proximity of the entrance to this Half Tide Dock to the northern end of the landing stage this kind of accident ought always to be regarded as a serious possibility, and there ought to be some means of communication either by signal, such as there is in many places, visible from one point to the other, or by a regular telephone system. In the absence of any such system —and we must take it that the master of the *King Orry* knew that there was no such system—it was his duty to find out what the position was, and having regard, on the one hand, to the impossibility of correcting things once he had started, and on the other that he started without making any inquiry at all, I entirely agree that the *King Orry* ought to be held liable for two-thirds of the total damage.

I want to say a little about the *Rockabill*. The view I take is that as regards starting to go out through the entrance she was completely protected by a definite direction from the Dock Board. I follow the principle indicated by Lord Halsbury in *Taylor* v. *Burger* (1), where he says you must not trouble about the particular words used ; you have got to form an opinion as to what the real intention and understanding of the order was. I have not the faintest doubt that in this case the dock-master intended to give and gave a definite order to the *Rockabill* to go out. That protects her owners from any liability for starting out, but it does not protect them, in my view, from liability for failing—as I think

(1) 8 Asp. M. L. C. 364.

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they did fail—to have a good look-out on their vessel, from the moment that they did start out pursuant to the order. The Dock Board's duty to the vessel ceased when the bow rope was cast off, except and in so far as it was necessary to have somebody available to take a rope from the vessel should she want to throw a line ashore whilst passing through but before she left the entrance. On the north quay they certainly performed that duty, because the dock-master, and the man with him, both walked down towards the river alongside the vessel as she was going out. But the master of the *Rockabill* had no business to put himself and others in such a position on the ship that he did not have an effective look-out from the moment he started. He had his chief officer on the bow, but on the bridge there was only himself with the second mate at the wheel, and nobody else at all. He said he had himself to look aft to watch his vessel coming through the narrow entrance. That is a thing he knew perfectly well he would have to do, or somebody would have to do, and he ought, therefore, to have had somebody to keep a look-out. Had he had somebody else on the bridge there is no doubt, in my mind, that he or the other man would, within a very small number of seconds, have observed that the *King Orry* was moving and he would have realized what the position was. We are advised by our assessors that it would have been perfectly feasible for a line to be thrown on to the quay, or the island, and for the vessel to have had her engines reversed. Ex hypothesi the vessel was going quite slowly out through the entrance; she was not going more than three knots when her stem reached what may be regarded as the river end of the entrance. Therefore, starting from nothing she was at first going so slowly that a very slight touch of full speed astern would have checked her way immediately, and the wind being practically a head wind, with fenders available, I am bound to conclude that it would have been perfectly easy for her to stop in the entrance. That being so, as she did not stop she was to blame. I agree with my brethren in thinking that she was only one-third to blame, for this reason, that although, in my view, it was her

definite duty to have a look-out one must take what I would call a human view of the position. By a human view I mean this, that as there was a man who had come from the place where the manœuvre started, and as the dock-master was standing on the quay and had given the order to come ahead, with a movement of his arms indicating " come ahead quickly," the master of the *Rockabill* from all that would undoubtedly infer that things were safe all round the offing. Consequently the failure to look out I think must be judged very much from the point of view of time ; before he reached the point going out where it was too late to take action I think he had time to look round for himself, but for the reason that he only had a short time with his vessel in independent motion, after the dock-master had ordered him to cast off, I think that one-third of the blame is sufficient.

The Dock Board are free from liability on two grounds : (i.) I do not think they were negligent, although this makes no difference in the result. I think that at the moment when the dock-master looked around on the order to cast off, the *King Orry* had not moved from the landing stage. It is quite possible that her bow rope had been cast off, but I see no reason to think she had moved. And if she had not moved there was nothing the dock-master could see ; and a fortiori there was nothing at an earlier point of time that Stafford could have seen in the way of movement of the *King Orry*. That is the only possible charge of negligence against the Dock Board. (ii.) But assuming that they were guilty of negligence as found by the learned judge, then I agree that under the Maritime Conventions Act there is nothing to alter the old common law position which confers freedom from liability on the defendant in a case of this sort where the accident is contributed to by the negligence of the plaintiff, and that as regards both the *King Orry* and the *Rockabill* it would be right to treat the accident as contributed to by all three parties.

For these reasons I agree with the result of the judgments.

GREER L.J. Before I deal with the question of costs I

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should like to say that I entirely agree with what Scott L.J. has said as to the desirability of there being some better method than exists, according to the evidence, of communication between the jetty and the Waterloo Dock.

Chappell K.C. Your Lordship may take it that the responsible people on the Dock Board will give the closest attention to the observations which have fallen from your Lordships.

On the question of costs :—

GREER L.J. The Dock Board will have their costs against the *King Orry*. You, Mr. Noad, have established that the *King Orry* was to blame for the collision. Subject to what Mr. Nelson may say, you ought to have the costs of your appeal, and the costs below ought to be divided in the same proportion as we have found the liability.

Nelson. If your Lordships make no special order it is a matter of discretion.

GREER L.J. It is a matter of discretion.

SCOTT L.J. I think myself that that ought to be the ordinary rule unless there is a reason to depart from it.

Nelson. I am instructed that it is not the ordinary rule.

SCOTT L.J. That is the reason why I have said what I have.

Nelson. Your Lordships are going to make that order ?

GREER L.J. Yes.

Solicitor for the appellants, the Mersey Docks and Harbour Board : *E. A. Moorhouse, Liverpool.*

Solicitors for the appellants, the owners of the *Rockabill* : *Botterell & Roche, for Weightman, Pedder & Co., Liverpool.*

Solicitors for the respondents, the owners of the *King Orry* : *Pritchard Sons, Partington & Holland, for Batesons & Co., Liverpool.*

E. C. M. T.

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Nullity of Marriage—Bigamy—Marriage celebrated abroad—Jurisdiction of the English Court—Domicil and residence of the parties—Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *ss.* 21, 32—*Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 42.

On a petition by a woman for nullity of a form of marriage contracted in a foreign country on the ground of the bigamy of the man, the domicil of the man is not an essential ingredient to found jurisdiction.

A woman, petitioner for nullity, went through a form of marriage abroad with a man whose wife was living, and two days later left the place of the marriage without consummation. The petitioner was domiciled and resident in England; the man, the respondent, was domiciled either in Malta, his domicil of origin, or Australia, his domicil of choice, and had never resided here. The man was served with notice to appear. He acknowledged service, but did not enter appearance. He also signed a written admission that when he went through the form of marriage with the petitioner he was a married man.:—

Held, that the woman never acquired the domicil of the man and that in the circumstances of the case the Court had jurisdiction and the woman was entitled to a decree nisi of nullity.

Quaere whether the Court would have had jurisdiction if the man had entered appearance under protest.

Roberts v. *Brennan* [1902] P. 143 followed. *Salvesen* v. *The Administrator of Austrian Property* [1927] A. C. 641 distinguished.

WOMAN'S PETITION for Nullity of Marriage on the ground of the bigamy of the man.

The petitioner, Ghislaine Rosy Bennett, went through a ceremony of marriage with Augustine George White, the respondent, on September 30, 1926, at Melbourne, Victoria, in the Commonwealth of Australia. On August 18, 1908, the respondent, Augustine George White, had been married to Mary Dolores Fleri at Malta. This marriage was subsisting, and Mary Dolores Fleri was still living at the date of the ceremony of the marriage of the respondent and the petitioner. The marriage of the petitioner and the respondent had not been consummated. The petitioner was domiciled and resident in England, and the respondent was domiciled and resident in Australia or Malta. The petitioner sought a declaration that her marriage to the respondent was null and void. The

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respondent did not appear and took no part in the proceedings beyond signing an acknowledgment of service of the petition and a formal admission of the case of the petitioner. On the petitioner applying in due course for the certificate of the Registrar that the proceedings were in order for trial in accordance with the Matrimonial Causes Rules, 1924, r. 30A, the Registrar refused to certify on the ground that there was no jurisdiction to entertain the suit, because the petition stated that the respondent was domiciled in Australia. On an appeal from this refusal of the Registrar to a judge in Chambers, Bucknill J. gave leave to set down the cause and referred the matter to the King's Proctor under the Judicature (Consolidation) Act, 1925, s. 181, sub-s. 1. The Attorney-General directed counsel to be instructed on behalf of the King's Proctor. On the case now coming on for hearing evidence was led in support of the allegations in the petition. By leave the evidence other than that of the petitioner was given by affidavit.

Noel Middleton K.C. and *W. Latey* for the petitioner. There has been a suggestion that jurisdiction in nullity cases depends on the domicil of the man, party to the suit. This is dealt with in *Inverclyde otherwise Tripp* v. *Inverclyde*. (1) That case was one of nullity on the ground of impotence. Bateson J. founded his judgment on the dicta of Lord Phillimore in *Salvesen* v. *Administrator of Austrian Property* (2); but the true effect of those dicta is that the Court of the domicil is competent to annul the marriage though celebrated elsewhere. In the earlier case of *Roberts* v. *Brennan* (3) it was held by Jeune P. that residence as distinct from domicil confers jurisdiction to annul a marriage on the ground of bigamy. The real meaning of what is laid down in the *Salvesen* case (2) is that a decision on the present issue given by the Court of the domicil is to be regarded as a conclusive decision, but that case is no authority for the proposition that the jurisdiction of the Court of the domicil is exclusive of all other Courts.

(1) [1931] P. 29.
(2) [1927] A. C. 641.
(3) [1902] P. 143.

That would be abandoning the sovereignty of English Courts over English subjects. *Sottomayer* v. *de Barros* (1) and *Simonin* v. *Mallac* (2) are older cases showing the mischief of neglecting English interests in this matter of international law by admitting foreign jurisdiction as an exclusive test. There is no doubt that the nullity of this marriage is a question that could be raised in the Chancery Division; *Hay* v. *Northcote* (3), where it would be decided by English law, and this Division is similarly empowered. The true construction of the Judicature (Consolidation) Act, 1925, ss. 21, 32, is that the jurisdiction of this Court in nullity cases is the same as that of the Ecclesiastical Courts with the addition of s. 42 of the Matrimonial Causes Act, 1857. (4) Even without that addition the Ecclesiastical Courts could have acted in the case of a respondent if resident though not domiciled here. *Eustace* v. *Eustace* (5) makes it clear that there may be jurisdiction without domicil if there is residence. The Statute of Citations, 23 Henry VIII., c. 9, no longer limits the orbit of jurisdiction. The extent of it is shown by *Faremouth* v. *Watson* (6), where the next of kin of the man were admitted to obtain a declaration of the nullity of his incestuous marriage, and *Blackmore and Thorpe* v. *Brider* (7) where an incestuous marriage was declared null and void although the woman does not appear to have been cited. In *Woods* v. *Woods* (8) a marriage between uncle and niece was formally annulled though it was void even without the declaration of the Court, the necessity of citing both parties being expressly negatived. (9) What is asked

(1) (1877) 3 P. D. 1, 7.

(2) (1860) 2 Sw. & Tr. 67.

(3) [1900] 2 Ch. 262.

(4) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 42: "Every such petition [for nullity of marriage] shall be served on the party to be affected thereby, either within or without Her Majesty's dominions, in such manner as the Court shall by any general or special order from time to time direct; and for that purpose the Court shall have all the powers conferred by any statute on the Court of Chancery. Provided always, that the said Court may dispense with such service altogether in case it shall seem necessary or expedient so to do."

(5) [1924] P. 45, 50.

(6) (1811) 1 Phill. Ecc. 355.

(7) (1816) 2 Phill. Ecc. 359.

(8) (1840) 2 Curt. 516, 528.

(9) As to sentences of nullity of incestuous marriages, see Shelford, ed. 1841, p. 179 et seq.

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in this case is merely a declaratory judgment. If the second marriage of the man is proved to have been void ab initio no harm can be done by so declaring. That would constitute no interference with the law of the domicil. The case of *Roberts* v. *Brennan* (1) puts the matter beyond doubt. What took place at Melbourne is the only circumstance to weigh against a finding of an English domicil of the petitioner, and apart from that so far as the report of *Roberts* v. *Brennan* goes (1) the Court there was clearly right in entertaining the suit on the ground of residence alone. A declaration as to status according to English law is clearly within the competence of this (English) Court. The onus of showing a change of the original English domicil of the petitioner is upon the King's Proctor, whose case it is to show a change: *Winans* v. *Attorney-General.* (2) The ceremony at Melbourne, by itself, is no proof of change of the domicil of the petitioner, which can only proceed from unity of the persons brought about by the marriage: per Lord Cave in *Lord Advocate* v. *Jaffrey* (3), approved in *Attorney-General for Alberta* v. *Cook* (4) (and see the references to Roman law, Bracton, Littleton, Coke, Blackstone and Oughton set out in the text of the report). If this marriage was voidable only, the woman would have acquired the domicil of the man; but it was confessedly void ab initio and therefore she remained a feme sole. It has never been said that a woman acquired the domicil of a man merely by going through a ceremony: *Riddlesden* v. *Cicely Wogan* otherwise the late wife of John Inglebert (5), where it is said the "divorce is but declaratory because the marriage was merely void and therefore there needed not any such sentence of divorce; for it was void ab initio and she always sole." [He also referred to *Linke* v. *Van Aerde* (6); *De Massa* v. *De Massa* (7) (where the Court merely declared as had already been decreed in the Court of the (foreign) domicil); *Lendrum* v. *Chakravarti* (8) (where the Scotch Court entertained proceedings

(1) [1902] P. 143.
(2) [1904] A. C. 287.
(3) [1921] 1 A. C. 146, 158.
(4) [1926] A. C. 444, 460.
(5) (1601) Cro., Eliz. 858.
(6) (1894) 10 Times L. R. 426.
(7) (1931) Times Newspaper, March 31.
(8) 1929 Sc. L. T. 96.

for the nullity of a Scotch marriage at the suit of a woman unquestionably domiciled in India); *Bateman* v. *Bateman* (1) (showing that the Court has no discretion to refuse a decree of nullity once bigamy is proved); *Sinclair* v. *Sinclair* (2); *Scrimshire* v. *Scrimshire* (3); and *Middleton* v. *Janverin.* (4)] *Turner* v. *Thompson* (5) is distinguishable. In that case the marriage had already been dissolved by the Court of the domicil and this Court dismissed a petition for nullity on the ground that no res remained for the Court to pronounce upon. The case is valuable for the dictum of Lord Hannen that the woman acquires the man's domicil by living with him there, a circumstance absent in the present case.

Clifford Mortimer for the King's Proctor. First it is impossible to differentiate nullity on the ground of bigamy from any other ground of nullity in the case of a marriage void ab initio. The same jurisdiction must extend to them all. I rely upon *Salvesen* v. *Administrator of Austrian Property* (6) and the judgment of Lord Haldane. Secondly, if this Court claims jurisdiction, it must concede it to foreign Courts. Lastly, the remedies under decrees of nullity are the same whatever the grounds. The same jurisdiction is applicable with reference to custody of children, orders for maintenance and variation of marriage settlements.

In *Salvesen's* case (6) Lord Haldane said: "If the status in question was a res within the meaning of the principle, the duty of our Courts is clear. In *Castrique* v. *Imrie* (7) this House adopting the language of Blackburn J. who was one of the judges who advised it, laid down that the inquiry is, first, whether the subject-matter is so situated as to be within the lawful control of the State under the authority of which the Court sits; and, secondly, whether the sovereign authority of that State has conferred on the Court jurisdiction to decide on the disposition of the thing and the Court has acted within its jurisdiction. In the careful judgment he delivered in

(1) (1898) 78 L. T. 472.
(2) (1798) 1 Hagg. Consist. 294, 297.
(3) (1752) 2 Hagg. Consist. 395.
(4) (1802) 2 Hagg. Consist. 437.
(5) (1887) 13 P. D. 37.
(6) [1927] A. C. 641, 655.
(7) (1869) L. R. 4 H. L. 414.

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the First Division the Lord President holds that the principle so laid down applies to a decree of divorce making it conclusive of the dissolution of the marriage at all events if the ground of the divorce was one or other of those recognized by the law of Scotland, namely, adultery or desertion. But he limits the application of the principle. It applies in his view to a decree of judicial separation for this alters the marriage status; it applies also to a decree of declaration of marriage. He thinks too that a decree of nullity founded on the impediment of impotency also falls within the principle. This is, indeed, in his view, not a bar to the constitution of marriage, but only a resolutive condition of the contract, invalidating by non-performance a marriage that was complete and assimilating the case to divorce. But the Lord President goes on to say that as in other instances nullity proceedings on certain grounds may be instituted by third parties having interest, the principle under discussion cannot become of universal application. He therefore thinks that a sentence of nullity on the ground of insanity, propinquity, prior marriage or non-compliance with the lex loci, is not a judgment disposing of married status and so a judgment in rem, notwithstanding that the sentence, if obtained in an action in which the pretended spouses are the parties, may be res judicata as between themselves. It seems, he says, plain that the competency of such actions by third parties having interest . . . . cannot spring from the intention of the persons who were parties to the pretended marriage; nor does the force of the decree pronounced in them necessarily depend on its being given by the Court of the pretended husband's domicil. My Lords, I do not find the judgment of the Lord President convincing, and am compelled to prefer the other view worked out by Lord Sands. There does not appear to be any reason why a judgment of nullity even on such restricted grounds as the Lord President mentions should not be regarded as disposing of the status of married persons."

A main requisite of jurisdiction in the Ecclesiastical Courts was that the husband should be in the diocese: Shelford, ed. 1841, p. 486. If that were so the residence of the wife was presumed to follow and continue. The power of the

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Court being in personam, the respondent could not be cited out of his diocese. In 1895 domicil was established as the sole test of the jurisdiction in divorce a vinculo: *Le Mesurier* v. *Le Mesurier*. (1) Later it became one of the tests in Restitution of Conjugal Rights, *Perrin* v. *Perrin*. (2) In *Eustace* v. *Eustace* (3) the respondent husband was not resident in England, but it was held by the Court of Appeal that there was jurisdiction to pronounce a decree of judicial separation on the ground of desertion at the suit of the wife, because he was domiciled here. Domicil was adopted as a basis of jurisdiction on the subject of nullity for want of formality in *Salvesen* v. *Administrator of Austrian Property* (4) and on that of nullity on the ground of impotence in *Inverclyde* v. *Inverclyde*. (5) Indeed in the latter case the Court of the domicil was held to be the exclusive forum. The general result is that domicil is now a sufficient ground for the Court to proceed on in all the forms of relief sought; where there is a marriage prima facie the domicil of the husband at the time of proceedings gives jurisdiction. The principle applies: "Actor sequitur forum rei" (see the subject dealt with in Dicey's Conflict of Laws, ed. 5 (1932), pp. 275 to 301). Both parties must have a domicil and matrimonial home in England at the time of the institution of the suit. The petitioner's residence here must also be the residence of the respondent. As to this see *Williams* v. *Dormer* (6) and *Chichester* v. *Donegal*. (7) In *Yelverton* v. *Yelverton* (8) the husband was domiciled in Ireland and the petition of the wife for restitution of conjugal rights was rejected by this Court because the residence within the jurisdiction was that of the wife alone, which would not suffice to give jurisdiction: it must be the residence of both parties, and in the Ecclesiastical Courts that meant the residence of the respondent, because in the event of non-compliance with the decree the remedy was by imprisonment: *Weldon* v.

(1) [1895] A. C. 517.
(2) [1914] P. 135.
(3) [1924] P. 45, 50.
(4) [1927] A. C. 641.
(5) [1931] P. 29.
(6) (1852) 2 Rob. Ecc. 505, 508.
(7) (1822) 1 Add. 5.
(8) (1859) 1 Sw. & Tr. 574.

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Weldon (1), leading to the passing of the Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), s. 2, now the Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 187, sub-s. 1. In *Yelverton* v. *Yelverton* (2) the petitioning wife was refused a decree of restitution of conjugal rights because her domicil was that of her husband and there was no proof that he had acquired an English domicil. Sir Cresswell Cresswell (3) refers to *Collett* v. *Collett* (4), and points out the importance at that date of the Statute of Citations, 23 Henry VIII., c. 9, as limiting the jurisdiction on the question of service according to the place where the party dwelt. Though this limitation had since been removed by the enactment of the Matrimonial Causes Act, 1857, s. 42, as to service, as he points out, the question of jurisdiction on the ground of domicil is not affected thereby. If the petitioner is a wife, she cannot be domiciled here if the respondent is not. *De Gasquet James* (*Countess*) v. *Mecklenburg Schwerin* (*Duke*) (5) does not affect the question, as there neither party had a domicil or place of residence within the jurisdiction of this Court. In *Le Sueur* v. *Le Sueur* (6) Sir R. J. Phillimore in dealing with divorces valid in one country and not another quotes from Lord Westbury in *Shaw* v. *Gould* (7) : " The inconvenient consequences of this state of law are obvious and have been frequently exposed with great force, particularly by Lord Brougham in his speech in giving judgment in the case of *Warrender* v. *Warrender* (8) ; but this disgraceful anomaly can only be removed by the Legislature," and he concludes : " In the case before me the wife is suing her husband not in the tribunal of the place of his original domicil or of the marriage or of the delictum or of his residence or of his acquired domicil but in a tribunal to which he has never been subjected by any act of his own. I think that according to the judicial exposition of the law in England by authorities which I am bound to follow in these circumstances, this

(1) (1883) 9 P. D. 52.
(2) 1 Sw. & Tr. 574.
(3) Ibid. 589.
(4) (1843) 3 Curt. 726.
(5) [1914] P. 53.
(6) (1876) 1 P. D. 139, 147.
(7) (1868) L. R. 3 H. L. 55, 88.
(8) (1835) 2 Cl. & Fin. 488, 546.

Court has no jurisdiction over the husband in this suit and I must, therefore, dismiss it." It has already been held that even a decree of judicial separation does not give the wife judicially separated from her husband the choice of a new domicil and that such a contention is contrary to the general principle on which the unity of domicil of the married pair depends and that, therefore, mere residence gives no jurisdiction. (1) The decision in *Roberts* v. *Brennan* (2) is criticized in Dicey, ed. 5, p. 299, on the ground that though that case is treated as an authority for residence being the test of jurisdiction it does not appear that the respondent husband was resident in England at the commencement of the proceedings.

W. Latey in reply. In all cases of marriage alleged to be void ab initio the Court must inquire whether there has been at least a form of marriage, to ascertain which it must hear the evidence of any petitioner living in the jurisdiction, especially if admittedly domiciled here up to the time of the putative marriage. If the evidence shows that there has never been a valid marriage the decree in the usual form proclaims it "to be absolutely null and void to all intents and purposes" and "the petitioner to be free from all bond of marriage with the respondent." The universality of the domicil test is limited by s. 32 of the Judicature (Consolidation) Act, 1925, which throws the Court back in nullity cases to the jurisdiction exercised by the Ecclesiastical Courts. There is no authority that the Court will refuse jurisdiction in a case like the present. *Pollard otherwise Wybourn* v. *Wybourn* (3) is an instance of the Ecclesiastical Court exercising jurisdiction in nullity against a party outside the jurisdiction and refusing to come within it.

Cur. adv. vult.

1937. Feb. 19. BUCKNILL J. In this case the petitioner asks the Court for a declaration that the marriage celebrated between her and the respondent, Augustine George White, may be declared

(1) *Att.-Gen. for Alberta* v. *Cook* [1926] A. C. 444, 465.
(2) [1902] P. 143.
(3) (1828) 1 Hag. Ecc. 725.

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null and void. The basis of the petition is that at the time when the petitioner went through a form or ceremony of marriage with the respondent he was already lawfully married to another woman. On the evidence placed before me I am satisfied that the respondent was lawfully married to one Mary Dolores Fleri at St. Bartholomew's Church, Tarscen, Malta, on August 18, 1908. The name of the respondent at that time was Agostino Bianchi. Subsequently the respondent left his wife Mary and Malta and went to Australia, and on September 30, 1926, went through a form of marriage with the petitioner at the residence in Melbourne of the minister of the Unity Church, according to the rites of the Unitarian Church. In the marriage register the birthplace of the respondent is stated to be Valletta, Malta, and his conjugal position to be a bachelor. I am satisfied, however, that at that time, namely, September 30, 1926, the respondent's lawful wife Mary was still alive. The petitioner was born in Paris in 1905. Brought to England at the age of five by her mother, who was a Frenchwoman, she and her mother took up their residence permanently in Liverpool. In 1919 the petitioner's mother married an Englishman in Liverpool and the petitioner continued to live with her mother and her step-father in England. In about 1926 the petitioner went to Australia for a trip, and while there went through the ceremony of marriage with the respondent which she now seeks to annul. Two days after the ceremony of marriage with the respondent the petitioner returned to England, and their marriage was never consummated. In 1927 the petitioner returned to Australia to join the respondent, but in fact never did so, for the respondent went back to Malta and rejoined his lawful wife, and later returned with her to Perth, Western Australia, where they are now living. In 1929 the petitioner returned to England after the death of her step-father, and she has resided in England since that date, and is, as I find, domiciled in England. The petition was filed on May 31, 1935, and at the end of it there is the usual notice to appear, as follows: "To Augustine George White, of 39, Hill Street, Perth, Australia. Take Notice that you are required within Sixty days after service

hereof upon you inclusive of the day of such service to enter an appearance either in person or by your Solicitor at the Divorce Registry of the High Court of Justice at Somerset House Strand in the County of London should you think fit so to do and thereafter to make answer to the charges in this petition and that in default of your so doing the Court will proceed to hear the said charges proved and pronounce judgment your absence notwithstanding." The notice was signed by the Registrar of this Court. On July 5, 1935, a sealed copy of the petition was served on the respondent, and he acknowledged service in the following terms: "I Augustine George White do hereby acknowledge that I am the person of that name mentioned in the within petition and that I have this day been served with a sealed copy of the said petition dated July 5, 1935 (Signed) A. George White." The respondent has not entered an appearance or taken any other part in the proceedings. When the petitioner applied to the registry in the ordinary course for a certificate that the proceedings in the cause were correct and the pleadings in order, the certificate was refused, because the petition states that "the respondent resides at Perth and is domiciled in Australia." On appeal I directed that the certificate should issue, so that the material facts could be ascertained at the hearing of the petition. I also directed that the papers be sent to the King's Proctor so that he, if the Attorney-General should so direct, might be represented at the hearing to assist the Court on the matter of jurisdiction. At the hearing a formal admission in writing dated January 5, 1934, and made to the agent of the petitioner by the respondent, was put in and is as follows: "I Augustine George White of 39, Hill Street, Perth, do hereby admit that I am the Augustine George White mentioned in the Copy of Marriage Certificate Numbered 3646 and that when I went through the form of marriage with Ghislaine Rosy Bennett I was a married man, my wife living in Malta. I also state that I am now living with my wife Dolores White at 39, Hill Street, Perth. (Signed) A. George White." In England it is established law that in cases where a dissolution of marriage is sought the domicil of the husband is the cardinal and controlling fact, and

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that the Court having jurisdiction in the country of that domicil has sole jurisdiction over the claim for dissolution of the marriage. This principle has also been applied to a case where the petitioner asked that the marriage which had been solemnized between two persons capable of entering the bond of matrimony should be declared null and void on the ground that the respondent was incapable of consummating it: *Inverclyde* v. *Inverclyde*. (1) In that case the marriage took place in England and at the commencement of the suit the petitioner resided in England and the respondent was domiciled in Scotland and resided in England and in Scotland. Objection to the jurisdiction was raised by the respondent. Bateson J. stated, as the basis of his decision, that "the marriage being voidable and not void and the decree affecting and involving an alteration of status and being a judgment in rem binding on all the world, there can be no jurisdiction in this Court unless all the parties are domiciled in this country. If the principle is sound that in a suit for dissolution of marriage jurisdiction depends on domicil it must equally so depend in a suit for dissolution on the ground of impotence. To call it a suit for nullity does not alter its essential and real character of a suit for dissolution." In the case now before me the petitioner is a woman, resident and domiciled in England, a citizen of this country. In the State of Victoria in the Commonwealth of Australia she has gone through a ceremony of marriage with a man already married. At the time when the petition was filed the man was residing in the State of Western Australia, and he is domiciled there, or possibly in Malta, his domicil of origin. Is there jurisdiction in this Court on proof of these facts to decree that this marriage is null and void? The jurisdiction of the Court in cases of nullity is statutory and is now contained in ss. 21 and 32 of the Judicature (Consolidation) Act, 1925. In substance this jurisdiction coincides with the jurisdiction of the Ecclesiastical Courts before the Divorce Court was set up in 1857. In procedure and practice the jurisdiction has to be exercised in the manner provided by the Act of 1925 or by rules of Courts, or in the manner in which it was exercised by

(1) [1931] P. 29.

the Ecclesiastical Courts. Rule 10 of the Matrimonial Rules of 1924 provides that any petition may be served within or without His Majesty's Dominions. Rule 13 provides that a petitioner cannot proceed to trial unless the respondent has appeared, or it is proved by affidavit that he has been duly served. The essential ingredients to establish jurisdiction in a case of nullity of this kind in this Court have not been clearly established by the reported cases. The case of *Inverclyde* v. *Inverclyde* (1) clearly does not decide the point. Bateson J. remarked in that case: "In truth bigamy cases help very little, as in them as distinct from this there has never been a marriage, and the argument that there is no distinction or difference between the two classes of cases seems to be untenable." In my opinion the case of *Salvesen* v. *Administrator of Austrian Property* (2) is not an authority against the exercise of jurisdiction in this case. In that case the House of Lords decided that a foreign Court has jurisdiction to grant a decree of nullity on the ground of illegality in the formation of the marriage tie which is binding on the Courts of Scotland, provided both the parties to the marriage were domiciled within the jurisdiction of the foreign Court at the time when the suit was brought. The case, therefore, decides that jurisdiction in a nullity suit may be based on domicil. Lord Phillimore even said that the foreign Court, in the circumstances of *Salvesen's* case (2), had exclusive jurisdiction, for he said: "Finally, if the Court is a competent Court, still more if it is the only competent Court—and in my opinion the Wiesbaden Court was the only competent Court for these parties—its judgment must, for the very reason of the thing be a definitive decree declaring a marriage void, which should be universally binding, and which should ascertain and determine the status of the parties once for all." But in *Salvesen's* case (2) both the petitioner and the respondent were in fact domiciled in Wiesbaden, whereas in the case before me the petitioner has not and never has had the same domicil as the respondent, and is in fact domiciled in England. It seems to me that it would be quite unsound to hold that in the case

(1) [1931] P. 29. (2) [1927] A. C. 641.

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now before me the petitioner ever acquired the domicil of the respondent, either in law or in fact. The case most apposite to the present case is *Roberts* v. *Brennan*. (1) In that case this Court granted a decree of nullity for bigamy on the ground that the parties had resided within the jurisdiction since the marriage ceremony. The suit was in essence the same as the present one, a petition by a wife for a decree of nullity on the ground that the man with whom she went through the ceremony of marriage had a wife living at the time. The ceremony took place in the Isle of Man. At the time of the issue of the petition the respondent was resident and domiciled in Ireland and the petitioner was apparently residing within the jurisdiction. It appears that at some time after the ceremony of marriage the parties resided together in England. The case was undefended. It was argued on behalf of the petitioner that residence within the jurisdiction was sufficient. Sir Francis Jeune pronounced a decree on the ground that, in his view, "residence—not domicil—is the test of jurisdiction in a nullity case. The jurisdiction of the Ecclesiastical Courts was based on the residence of the parties, and in suits for nullity this Court follows the practice of the Ecclesiastical Courts, as prescribed in s. 22 of the Matrimonial Causes Act, 1857."

Shelford's Law of Marriage and Divorce, published in 1841, at p. 486 states that in matrimonial causes the power of the Court is in personam, and depends upon the locality of the person cited. Though a defendant may usually reside out of the jurisdiction, yet if he is served with a citation within the jurisdiction of an Ecclesiastical Court in England in a suit for nullity of marriage, that Court has jurisdiction to try the validity of the marriage wherever it may have been contracted. *Roberts* v. *Brennan* (1) decided that in a case such as the present it is not the so-called husband's domicil which is an essential ingredient to found jurisdiction, and that residence within the jurisdiction of the parties at any time since the marriage is sufficient. The present case, however, goes one step further, so far as the respondent is concerned. On the other hand, it is in one respect a stronger case, in that the

(1) [1902] P. 143.

petitioner is domiciled and resident here. If, as in this case, the respondent has never resided in England, but the petitioner is domiciled and resident here, is it necessary for her to proceed to whatever part of the world the respondent may happen to reside in, in order to get her status established by a decree of nullity? This would impose a heavy burden indeed on the petitioner, for the respondent may move about from place to place and have no fixed residence. Counsel on behalf of the King's Proctor argued that in a case of nullity such as this, jurisdiction must be based on the residence or domicil of the respondent within the jurisdiction. He also argued that the decree asked for in this case was not merely declaratory, but that the statutory jurisdiction of the Court was invoked and that certain consequences might flow from such a decree (although not in fact asked for in this case) such as custody of children, orders for maintenance or variation of settlements. He further argued that there was a general principle that this Court would not exercise jurisdiction in a case where the respondent has not subjected himself to the jurisdiction by residence or domicil or by submission to it. I appreciate the weight of these arguments, and if the respondent had entered an appearance to the petition under protest against the exercise of jurisdiction, I should have had serious doubts whether this Court had jurisdiction over the matter. But I do not think I have to decide that question in this case. In my view, the respondent, by his conduct and by his admissions, has so acted as to justify the Court in exercising jurisdiction. He has not in terms submitted to the jurisdiction, but he has, I think, made it clear that he has no objection to its exercise. In my view, under the special circumstances of this case, the Court has jurisdiction to make the decree sought by the petitioner. There cannot be any conflict of laws between different jurisdictions, because it is clear that the ceremony was bigamous, and therefore by the law of every Christian community there never was any matrimonial status common to the petitioner and the respondent. Neither can the respondent suffer any injustice by the exercise of the jurisdiction. Moreover, it seems to me just to the petitioner and

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also in the public interest that the petitioner, being domiciled and resident in this country, should have her status as a single or as a married woman judicially established by this Court, and should not have to proceed abroad to wherever place the respondent happens to reside in for that purpose, at all events unless the respondent objects to this jurisdiction. Under these circumstances, unless it is clear that this Court has no jurisdiction to pronounce a decree, I consider that I ought to interpret the Act in such a way as to provide the remedy sought for.

I therefore pronounce a decree nisi.

Solicitors for the petitioner: *Robinson & Bradley, for Gee, French & Entwistle, Liverpool; The King's Proctor.*

R. M. M.

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1937
March 1.

Divorce—Variation of settlement—Petition for variation filed by guilty wife—Consent of parties interested—Possible interest of unborn persons adversely affected—Matrimonial Causes Act, 1859 (22 & 23 *Vict. c.* 61), *s.* 5—*Matrimonial Causes Act*, 1878 (41 & 42 *Vict. c.* 19), *s.* 3—*Judicature (Consolidation) Act*, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 192.

The Court made an order for variation of a marriage settlement at the instance of the wife, who had been found guilty of adultery, and by whom the whole property affected had been brought into settlement, disregarding the possible interests of unborn children of volunteers under the settlement. The volunteers under the settlement consented. The husband did not appear.

VARIATION OF SETTLEMENT.

A decree absolute was pronounced on November 2, 1931, dissolving a marriage on the ground of the adultery of the wife. There were no children of the marriage. A post-nuptial settlement had been executed on December 2, 1919, all the settled property being brought in by the wife or her father. The husband settled nothing. The trusts of the settlement were to pay the income to the wife for life and thereafter to the husband for his life or until he should marry again, but only in the event of there being issue of the marriage living at the death of the wife, and if there should be no issue upon certain trusts for such of the sisters of the wife as should be living at the death of the survivor of the spouses and the children of such sisters. In the event which had happened the husband took no interest in the settled fund. On September 24, 1936, the wife married a second time, an event which under the settlement gave her power to appoint a moiety of the trust fund to the second husband for life and subject thereto to any children of hers by him. On December 2, 1936, the wife having obtained the leave of the President for that purpose filed a petition for variation of the settlement out of time, this step not having been previously taken by reason of the first husband retaining no interest in the trust fund in the absence of children. The wife now desired to make a provision out of the trust funds for any children by her

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second marriage notwithstanding that her first husband was still living. The wife consented to a report of the Registrar on the petition to vary to the effect that the settlement should be read as if the first husband were now dead and had died in the lifetime of the wife, with all necessary rectifications and amendments to give the wife power to make the settlement she desired upon any children of her second marriage. There were two sisters of the wife. They were unmarried and consented. The first husband did not appear.

[BUCKNILL J. The sisters of the wife might have children who would be affected.]

F. L. C. Hodson for the wife and her sisters in support of a Motion to confirm the Report. The Motion is under the Judicature (Consolidation) Act, 1925, s. 192, which re-enacts the powers of the Matrimonial Causes Acts, 1859, s. 5, and 1878, s. 3. There is no reported case which negatives the right of a party found guilty in the suit to approach the Court on an application to vary a settlement. In *Wootton-Isaacson* v. *Wootton-Isaacson* (1) Gorell Barnes J. expressly refrained from laying down such a rule having regard to the variety of cases that might occur within the operation of the section. In *Suart* v. *Suart* (2) Sir Samuel Evans P. said that prima facie it would seem that the application to vary might be made by any party. In that case he entertained such an application by the respondent, the case being one of nullity, and added: "The important question in these cases is not by which of the parties the application is made, but how the powers conferred on this Court are to be exercised." The wife in this case, although the guilty party in the suit, is making a meritorious application on behalf of children she may have by her second marriage. Her sisters, the principal parties affected, consent. As to their possible children, *Meredyth* v. *Meredyth and Leigh* (3) and *Morrissey* v. *Morrissey* (4) are authorities that only living persons have interests to be considered. The Court will overlook the interest of unborn

(1) [1902] P. 146.
(2) [1910] P. 246, 248.
(3) [1895] P. 92.
(4) [1905] P. 90.

children of volunteers. The husband brought in no property and is not present to object.

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BUCKNILL J. made an order confirming the report. Costs out of the settled property.

Solicitors: *Emmet & Co.*

R. M. M.

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Dec. 17, 18.
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Feb. 22, 23;
March 22.

THE STRANNA.

Shipping—Bill of lading—Timber cargo—Loss of deck cargo owing to ship listing while loading—Exceptions—" Perils . . . . and accidents of the sea "—" At charterer's risk "—Negligence.

The plaintiffs' timber was loaded on the defendants' ship under bills of lading which contained the following exceptions: (*a*) " perils of the sea . . . . and all and every other dangers and accidents of the seas, rivers and navigation wheresoever, including ports of loading . . . . of whatever nature and kind soever . . . . excepted, even when occasioned by negligence . . . . " (*b*) Deck cargo to be carried " at charterer's risk."

While loading, a portion of the deck cargo was lost overboard owing to the ship taking a sudden list. The plaintiffs alleged that the list was due to negligence in so loading the ship, that she became unstable and that the loss did not come within the exception " perils . . . . *of* the seas." The defendants alleged that the list was caused by a strong flood tide and under-current, and they relied on exception (*a*) " perils . . . . and accidents of the seas " and alternatively under (*b*), on the absence of negligence, it being admitted that the words " at charterer's risk " would not protect the defendants if they had been negligent:—

Held, (i.) that the plaintiffs' claim failed, because, although the Court was left in doubt as to how exactly the casualty was caused, the loss was of a character to which a marine adventure was subject and was within the exception " perils . . . . and accidents of the seas."

(ii.) (if it should be necessary to decide the second point) that the words " at charterer's risk " did not put on the goods owner the risk of loss in every case in which the cause of the loss was unknown, and that, although the cause of the listing was left in doubt, the defendants had failed to provide an explanation in any sense comparable in probability with the probability of their own negligence in the loading of the timber, and therefore, that on this issue the defence failed.

ACTION for breach of contract.

The plaintiffs, the owners of cargo lately laden on board the steamship *Stranna*, claimed against the owners of the vessel in respect of the loss of a quantity of timber of which the plaintiffs were the owners under bills of lading dated Alma, N.B., July 23, 1935.

By the bills of lading the defendants acknowledged the shipment of 1200 standards of timber in good order and

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condition and undertook to deliver the same in the like good order and condition at Belfast. The plaintiffs contended that in breach of their contract the defendants failed to deliver 4843 pieces which were lost overboard while loading in Herring Cove, N.B., and that the loss was occasioned by reason of the negligence of the master or other officers in so loading the *Stranna* and/or so stowing the timber as to render the ship unstable and bring an excessive strain to bear on the timber used as uprights to support the deck cargo causing the uprights to give way.

The defendants relied on the exceptions in the bill of lading " . . . . perils of the sea . . . . and all and every other dangers and accidents of the seas, rivers and navigation wheresoever, including ports of loading . . . . of whatever nature and kind soever . . . . always mutually excepted, even when occasioned by negligence, default or error in judgment of the . . . . master mariners or other servants of the shipowners." They further relied on a provision in the bills of lading that the deck cargo was " at charterer's risk."

The defendants alleged that it was foggy weather, that there was a strong flood tide and a strong under-current, and that the ship took a heavy list first to port and then to starboard causing the stanchions securing the deck cargo to break and that it was impossible to retrieve the timber shot overboard owing to the strong tide and the fog.

Sir Robert Aske K.C. and *J. V. Naisby* for the plaintiffs. The defendant shipowners, as bailees, admit the receipt of the plaintiffs' timber and that they have not delivered a portion of it. There is therefore a breach of contract and a prima facie case of negligence, and the onus is on the defendants to bring themselves within one or other of the excepted risks. The words " at charterer's risk " do not excuse the defendants in the case of loss arising from negligence. The plaintiffs have no further onus at this stage, and it is for the defendants to begin and explain how the loss occurred.

[LANGTON J. I think that is so.]

H. U. Willink K.C. and *Cyril Miller* for the defendants. The

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loss was due to a cause excepted in the bills of lading: "perils of the sea . . . . and all and every other dangers and accidents of the seas, rivers and navigation wheresoever, including ports of loading . . . . even when occasioned by negligence." This was an accident caused by the listing of the ship, and even if (contrary to the defendants' contention) that list was due to negligence, it is immaterial. It is none the less a loss by a "peril of the sea"; no extraordinary violence of waves or wind is necessary to constitute a peril of the sea: see *The Xantho* (1); and further there are the words "dangers and accidents . . . . of navigation," which, as Lord Herschell said in that case, "cannot have a narrower interpretation," and, it is submitted, have a wider one. The idea of something fortuitous and unexpected is involved in the words "peril" and "accident": *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (2), and this casualty was both fortuitous and unexpected. A ship does not list without the intervention of wind or tide, and an accident of this sort could not happen except on water. In *Blackburn* v. *Liverpool, Brazil and River Plate Steam Navigation Co.* (3) it was unsuccessfully argued that the damage was not caused by a peril of the sea because the water had been intentionally let into the ship; and even reckless negligence can still be an accident: *The Torbryan.* (4) The facts in the present case are very similar to those in *Laurie* v. *Douglas* (5), where part of a deck cargo was lost in port through the tackle breaking, and this was held to come within the exception of "dangers and accidents of the seas, rivers and navigation . . . ." : see also *Wade* v. *Cockerline* (6) and *C. Wilh Svenssons Travaruaktiebolag* v. *Cliffe Steamship Co.* (7), where, however, the exceptions clause contained the words "accidents to hull."

As regards the exception "deck cargo" to be carried "at charterer's risk," it is not contended that this clause alone would relieve the shipowners if their negligence was established (*Svenssons'* case (7)); but the onus is on the plaintiffs to

(1) (1887) 12 App. Cas. 503, 508.
(2) (1887) 12 App. Cas. 518.
(3) [1902] 1 K. B. 290.
(4) [1903] P. 194.
(5) (1846) 15 M. & W. 746.
(6) (1905) 10 Com. Cas. 47 and 115.
(7) [1932] 1 K. B. 490.

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prove it, and that cannot affect the other exceptions relied on, which apply even if the loss is occasioned by negligence.

[Reference was also made to *The Glendarroch.* (1)]

Sir Robert Aske K.C. and *J. V. Naisby* for the plaintiffs. To hold that the mere fact that cargo falls overboard owing to the ship listing brings the loss within the exception of " perils of the sea " or " dangers and accidents of the sea " would greatly extend any previous decision on these words. It is quite immaterial that the timber fell into the water; it was not a loss peculiar to the sea any more than the overbalancing of a lorry load of timber on to the road has anything to do with the road, it is merely an accident " on " the road, and the loss in the present case was an accident " on " the sea, but not a peril, danger or accident " of " the sea nor a danger " of " navigation. In *Wade* v. *Cockerline* (2) and *Svenssons'* case (3) it was only because the bills of lading contained the exception " accidents to hull " that the defendants escaped liability. Weakness or an aperture in the hull will always let in the sea, and that is the basis of such decisions as *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (4) and *Blackburn's* case. (5) The list was not caused by the water or the wind or current but by some negligence in the loading of the cargo, and the loss was not due to a marine risk any more than the loss of the floating dry dock in *Grant, Smith & Co. and McDonnell, Ld.* v. *Seattle Construction and Dry Dock Co.* (6), on which the plaintiffs strongly rely. The floating dock sank owing to its own inherent weakness, but it could not have sunk except in water, and yet it was held not to be a peril of the sea: see also *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (7), and *E. D. Sassoon & Co.* v. *Western Assurance Co.* (8), in both of which, but for the presence of the sea, the accident would not have happened; but in both cases the loss was held not to be caused by a peril of the sea. So here, the loss was a building peril, the stability of the ship was not properly calculated, and owing

(1) [1894] P. 226.
(2) 10 Com. Cas. 47 and 115.
(3) [1932] 1 K. B. 490.
(4) 12 App. Cas. 518.
(5) [1902] 1 K. B. 290.
(6) [1920] A. C. 162.
(7) 12 App. Cas. 484.
(8) [1912] A. C. 561.

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either to improper piling, or possibly mismanagement of the ballast tanks, the ship listed. It was not fortuitous and not an accident.

It is for the defendants to prove what the " peril of the sea " was and they have failed to do so; their theory of cross-currents and a strong flood tide is quite untenable, and in the result they have not displaced the prima facie presumption of negligence: see *Travers & Sons* v. *Cooper* (1) and *Phipps* v. *New Claridge's Hotel.* (2) It is not sufficient for them, as in *The Kite* (3), to show a state of facts equally consistent with negligence as with the absence of negligence, for they are bailees of the goods and failed to deliver them, and the plaintiffs can have no knowledge as to the reason for that failure.

[Reference was also made to *Baxter's Leather Co.* v. *Royal Mail Steam Packet Co.* (4); *The Glendarroch* (5); *The Thrumscoe* (6); *Mountain* v. *Whittle* (7); and *P. Samuel & Co.* v. *Dumas.* (8)]

Willink K.C. in reply. In those cases in which it was held that the loss or damage was not a peril of the sea there was, in the words of Lord Herschell in *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (9), nothing " of a character to which a marine adventure is subject." This loss was clearly a marine casualty; an unintended heeling over while loading, however caused, is essentially a peril of the sea. In *Grant's* case (10), on which the plaintiffs rely, the sinking was due to the inherent unfitness of the floating dry dock; there was nothing fortuitous in the accident, it was bound to happen.

The defendants have given evidence to show that the timber was lost overboard, and the prima facie evidence of negligence, which arises because the defendants have received the plaintiffs' goods and failed to deliver them, is discharged; the deck cargo was " at charterer's risk " except for negligence, and the onus is on the plaintiffs to establish negligence; if

(1) [1915] 1 K. B. 73, 87.
(2) (1905) 22 Times L. R. 49.
(3) [1933] P. 154.
(4) [1908] 1 K. B. 796; [1908] 2 K. B. 627.
(5) [1894] P. 226.
(6) [1897] P. 301.
(7) [1921] 1 A. C. 615.
(8) [1924] A. C. 431.
(9) 12 App. Cas. 484, 498.
(10) [1920] A. C. 162.

the goods were lost through an unascertained cause the plaintiffs fail.

[LANGTON J. In *The Waalstroom* (1), affirmed by the Court of Appeal in *The Paludina* (2), Hill J. said that the burden of proof always rests on the plaintiffs, but that the facts may speak for themselves and in themselves shift the burden upon the defendants.]

In the present case evidence having been given which affords reasonable explanation of how the loss could have occurred without negligence on the part of the defendants (see *The Kite* (3) and *Brook's Wharf and Bull Wharf, Ld.* v. *Goodman Bros.* (4)), the only question is whether the plaintiffs have affirmatively established negligence.

[Reference was also made to *Anderson* v. *Morice* (5), approved by the Privy Council in *Ajum Goolam Hossen & Co.* v. *Union Marine Insurance Co.* (6), and *Pickup* v. *Thames and Mersey Marine Insurance Co.* (7)]

Cur. adv. vult.

March 22. LANGTON J. read the following judgment: I have taken time to put this judgment into writing because Sir Robert Aske has told me that the case raises a new and important point of law. As to the novelty of the point I am in agreement with Sir Robert. As to its importance I will not venture an opinion.

The case arises out of the loss of a certain portion of a timber cargo which had been placed on deck of the Norwegian steamship *Stranna*. The governing documents in the contract of carriage are agreed to be bills of lading in a fairly familiar form which provide (inter alia): (*a*) that the deck cargo is to be carried at "charterer's risk," and contain (*b*) the following exceptions: " . . . . perils of the sea . . . . and all and every other dangers and accidents of the seas, rivers and navigation wheresoever, including ports of loading . . . . of whatever nature and kind soever . . . . always mutually excepted,

(1) (1923) 17 Ll. L. Rep. 53.
(2) [1925] P. 40, 44.
(3) [1933] P. 154.
(4) [1937] 1 K. B. 534.
(5) (1874) L. R. 10 C. P. 58, 67.
(6) [1901] A. C. 362.
(7) (1878) 3 Q. B. D. 594.

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even when occasioned by negligence, default or error in judgment of the . . . . master, mariners or other servants of the shipowners."

The uncontroverted facts are as follows: On July 23, 1935, the *Stranna* was lying in an open roadstead called Herring Cove, New Brunswick. She had been lying at anchor in this spot since July 12, taking on board a cargo of timber composed of 1200 standards, or 48,130 pieces, of which 9618 pieces were to be carried on deck. At about noon on July 23 about 12 standards remained to be loaded. The weather was a thick fog, there was no appreciable wind and the water was calm.

Herring Cove is situated just north of Matthews Head in Chignecto Bay off the coast of New Brunswick. The cargo of the *Stranna* was being brought out to her in vessels known as motor scows, which came out of the River Alma into the Cove. In the early afternoon the vessel, while still loading, listed to port and carried away the wooden uprights or stanchions on the port side, thereby causing a considerable quantity of timber to be lost overboard. The vessel then rolled to starboard, and uprights on that side were likewise broken, causing or allowing more of the cargo to fall overboard. A flood tide was running at the time. The timber drifted away and was soon lost sight of in the prevailing fog and was not recovered. In all the lost timber amounted to 4843 pieces.

At the outset of the case the plaintiffs claimed that since the shipowners, as bailees of the goods, admitted that they had received the goods and had not delivered some of them, there was a prima facie case of negligence against the defendants and that the onus lay on the shipowners to displace this prima facie case.

The defendants agreed that the provision that deck cargo was " at charterer's risk " did not excuse them for negligence, and accepted the onus to the extent of admitting that the pleaded facts put a duty upon them to furnish an explanation of how the loss occurred. Their explanation was given through the medium of Captain Abrahamsen, the master of the vessel, together with the vessel's log, and a written statement from

the mate, Thomas Gunulfsen, which was admitted in evidence subject to the comment that the witness had not been cross-examined.

Before this explanation was given, the particulars embodied in the defence were amended by leave to include an allegation that, in addition to a strong flood tide, there was running at the time of the casualty a strong under-current. Upon this alleged under-current, running, as it was said, counter to the true flood tide, a curious structure of theory was erected. The master averred with an air of passionate conviction that the mishap had been caused by reason of his vessel having been caught and held broadside to the tide by the strong under-current. I was invited to imagine that these countervailing forces had undermined the stability of an otherwise steady ship and caused her to behave in an unexpected, unpredictable and wholly unprecedented manner.

I am bound to admit that my imagination flagged sadly in the effort to visualize this theory. Throughout a long experience of cases involving the difficult question of stability I have never yet heard of current as a factor. But if one allows for purposes of argument that it might enter, it is still impossibly difficult to me to conceive how or why two currents, impinging with almost equal force (for the ship lay ex concessis across them both) on opposite sides, should affect the ship's stability otherwise than favourably. In the extremely limited scientific knowledge at my command, equal forces applied externally on opposite sides form a poor method of deranging the stability of any object, whether afloat or ashore.

I was greatly relieved, therefore, when I found that this theory received no blessing, nor indeed any adherence, from Mr. Camps, the very well known marine surveyor, who was called on behalf of the defendants. Equipped as he is with scientific knowledge and wide marine experience, Mr. Camps even doubted whether it was possible for a vessel to lie in cross-currents with her anchor at right angles as described by the mate, and he professed himself quite unable to provide any scientific reason for the ship's behaviour in the absence of the necessary data which would enable him to calculate initial and

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final stability. I came to the conclusion that the master, who was an impulsive witness, was giving me a history of the occurrence which he had persuaded both himself and the mate to be true, but which was actually a version of the occurrence coloured by a somewhat fantastic theory conceived after the event.

Mr. Flannery, on behalf of the plaintiffs, was no more successful than Mr. Camps in supplying any actual scientific reason for the listing of the *Stranna*, though he held fast, as I understood him, to the theory of a loss of stability caused either by overloading on deck or faulty management in respect of tanks. He, too, admitted frankly that he had no data upon which to base scientific reasons, and could only make rough arithmetical calculations on assumed figures. Before leaving this question of tide and current I ought to say that I see no reason to doubt the accuracy of the Admiralty chart as regards the force of the tide, nor did the evidence, such as it was, concerning the under-current convince me that such a current was of any appreciable force. In the end I was left with a clear explanation, so far as it went, of how the cargo had come to be lost, but with no material on which to base a finding as to the cause of the vessel's strange behaviour in listing as she did before taking on board the full complement which she had carried previously in safety and was expected to carry again.

That casualties of this character occur in the timber trade is not only common knowledge, but is witnessed by several reported cases. Two of the best known of these are *Wade* v. *Cockerline* (1) and *C. Wilh Svenssons Travaruaktiebolag* v. *Cliffe Steamship Co.* (2) in each of which, though the contract of carriage differed in terms from that in the present case, the facts were not dissimilar.

Sir Robert Aske, for the plaintiffs, criticized the evidence for the defendants in severe terms. Much of this severity was well justified. The master, Captain Abrahamsen, was a poor witness and he fared badly in cross-examination. The ship's documents were in some respects in conflict with the oral testimony, and the mate's written statement also contained

(1) 10 Com. Cas. 115. (2) [1932] 1 K. B. 490.

matter in apparent contradiction to the log. Some of these difficulties can, I think, be overcome if one reads both the log and the mate's statement as not being drawn up in strict order of chronology, and I did not feel that any one on behalf of the ship was attempting to present a consciously false case. Stated at its highest, however, the ship's explanation did not reach any further point than proving that the goods were lost through falling into the sea, while the vessel was loading, by reason of the ship heeling in an unexpected manner first to port and then to starboard. To this meagre and unsatisfactory material it becomes necessary to apply the contract to ascertain whether the defendants are liable.

Mr. Willink, for the shipowners, takes two points. If either of them be sound the defendants have a complete defence to the action. I will summarize them as follows: First, he says that this is a peril or accident of the sea, and if this be so it is immaterial whether such peril or accident was caused by negligence, because negligence is excepted in so far as it causes such perils or accidents. Secondly, the deck cargo was at "charterer's risk," and although it is conceded that this exception does not include risk caused by negligence, no negligence has been established here, and the cargo-owner takes the chance under this clause of loss by unascertained causes.

The first of these points raises the question of law which Sir Robert Aske claims to be new. On behalf of the plaintiffs he replies that the loss in this case is not a peril of the sea. All that is known is that the vessel heeled and that the lost cargo fell overboard into the sea. The mere falling of cargo into the water is not a peril of the sea, nor is stability a property peculiar to the sea or governed only by the sea. In a word the plaintiffs' point is that this is a peril *on* the sea, not a peril *of* the sea. The argument proceeded thus: What you do of your own volition to a ship is not a peril or accident of the sea. If the heeling of the ship be produced by putting cargo into or on her, it is the cargo and not the water which is heeling the vessel. What you do by design is not fortuitous and therefore neither a peril nor an accident. The occurrence here under

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consideration accordingly lacks both the elements necessary to bring it within the exception relied on : it has no special marine character which would allow it to be classified as being " of the sea," and it has no quality of the fortuitous which would enable it to be ranked as a peril or accident.

The locus classicus upon this subject of what is and what is not a " peril of the sea " is to be found in what Mr. Willink referred to as a famous trilogy of decisions which follow each other directly in the reports—namely, *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (1) ; *The Xantho* (2) ; and *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (3) These well known cases set at rest many controversies then current in the legal world concerning the insurance and carriage of goods by sea. For present purposes the first of the three seems to me to be the most fertile both in principle and in canons of construction. In *Thames and Mersey Marine Insurance Co., Ld.* v. *Hamilton, Fraser & Co.* (1) it is well to note at once the warning of Lord Macnaghten : " Your Lordships were asked to draw the line and to give an exact and authoritative definition of the meaning of the expression ' perils of the seas ' in connexion with the general words. For my part I decline to attempt any such task. I do not think it is possible to frame a definition which would include every case proper to be included, and no other. I think that each case must be considered with reference to its own circumstances, and that the circumstances of each case must be looked at in a broad commonsense view and not by the light of strained analogies and fanciful resemblances."

Where Lord Macnaghten has forborne to tread, lesser men may be excused from the adventure. I shall attempt no definitions. In what seemed to me to be the least happy part of an otherwise powerful argument Sir Robert Aske propounded the analogy of a lorry being loaded, as the *Stranna* was loaded, with either timber or bricks until a list was produced and the load slipped off the top on to the road. I cannot think that this is a happy analogy. It belongs rather

(1) 12 App. Cas. 484, 502.
(2) 12 App. Cas. 503.
(3) 12 App. Cas. 518.

to my thinking to the class of fanciful resemblances mentioned by Lord Macnaghten: but Sir Robert Aske's argument rests on far more solid foundations than a mere analogy. I was invited by Mr. Willink to test these foundations by a passage in Lord Herschell's speech in *Thames and Mersey Marine Insurance Co., Ld.* v. *Hamilton, Fraser & Co.* (1): "It will be observed that Lord Ellenborough limits the operation of the clause to 'marine damage.' By this I do not understand him to mean only damage which has been caused by the sea, but damage of a character to which a marine adventure is subject. Such an adventure has its own perils, to which either it is exclusively subject or which possess in relation to it a special or peculiar character."

This passage appears to me to shed great light on the problem. The actual words in these bills of lading are "perils of the sea . . . . and all and every other dangers and accidents of the seas . . . . wheresoever, including ports of loading." There are not many judicial pronouncements upon the term "dangers and accidents of the seas," but we have again the high authority of Lord Herschell in *The Xantho* (2): "The question, What comes within the term 'perils of the sea' (and certainly the words 'dangers and accidents of the sea' cannot have a narrower interpretation) . . . ." Armed with this authoritative dictum we can at least proceed with the certainty that the introduction of the term "dangers and accidents" does nothing to cut down the ambit of "perils of the sea," and I would draw special attention to the words "including ports of loading" in this case.

With these matters in mind one may pass now to a review of the principal authorities, remembering always that the occurrence must be fortuitous and must have a marine character in order to fall within the meaning of this exception. *Thames and Mersey Marine Insurance Co., Ld.* v. *Hamilton, Fraser & Co.* (3); *E. D. Sassoon & Co.* v. *Western Assurance Co.* (4); and, perhaps strongest of all, *Grant, Smith & Co. and*

(1) 12 App. Cas. 484, 498.
(2) 12 App. Cas. 503, 508.
(3) 12 App. Cas. 484.
(4) [1912] A. C. 561.

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McDonnell, Ld. v. *Seattle Construction and Dry Dock Co.* (1) lie on one side of the line, and provide instances of occurrences causing loss on the sea which are not " perils of the sea."

In *Thames and Mersey Marine Insurance Co., Ld.* v. *Hamilton, Fraser & Co.* (2) (the donkey-engine case) the air chamber of the donkey-pump gave way under an excessive pressure of water owing to the outlet being closed. The House of Lords held that this accident was devoid of any special marine character. In *Sassoon's* case (3) a worn-out hulk sank by the incursion of water owing to its rotten condition: and the Privy Council held that there was nothing fortuitous. What must happen is not an accident. In *Grant's* case (1) the question was more difficult. A dry dock capsized, sank, and was lost while being used for a legitimate purpose—to submerge caissons as a feature of harbour construction. There could be little doubt of the marine character of the operation, and at first sight it would appear that there was some element of the fortuitous in the occurrence. But the Privy Council held that the dock was " destroyed because of its own inherent unfitness for the use to which it was put " and followed the Board's own decision in *Sassoon's* case. (3) Lord Buckmaster, who delivered the judgment of the Board, compared the dock to a vessel unfit to carry her cargo: " It is just as though a vessel, unfit to carry the cargo with which she was loaded, through her own inherent weakness, and without accident or peril of any kind, sank in still water." Again, therefore, the element of the fortuitous was negatived.

On the other side of the line are: *The Xantho* (4); *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (5); *Blackburn and Another* v. *Liverpool, Brazil and River Plate Steam Navigation Co.* (6); and *Mountain* v. *Whittle.* (7) In *The Xantho* (4) the House of Lords held that foundering by collision is within " dangers and accidents of the sea." Lord Herschell disposed of the contention that the words are limited to casualties

(1) [1920] A. C. 162, 170, 171.
(2) 12 App. Cas. 484.
(3) [1912] A. C. 561.
(4) 12 App. Cas. 503, 509.
(5) 12 App. Cas. 518.
(6) [1902] 1 K. B. 290.
(7) [1921] 1 A. C. 615.

produced by tempestuous conditions. He said: "It was contended that those losses only were losses by perils of the sea, which were occasioned by extraordinary violence of the wind or waves. I think this is too narrow a construction of the words, and it is certainly not supported by the authorities, or by common understanding. It is beyond question, that if a vessel strikes upon a sunken rock in fair weather and sinks, this is a loss by perils of the sea. And a loss by foundering, owing to a vessel coming into collision with another vessel, even when the collision results from negligence of that other vessel, falls within the same category." And Lord Bramwell added to the catalogue of fair weather casualties. He said (1): "The argument is, that wind and waves did not cause the loss, but negligence in some one. But surely, if that were so, a loss by striking in calm weather on a sunken rock not marked on the chart would not be a loss by perils of the sea within the bill of lading; or striking on a rock from which the light had been removed, or an iceberg, or a vessel without lights. I cannot bring myself to see that such cases are not losses by perils of the sea."

In *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (2), where rats gnawed a hole in a pipe on board the ship whereby sea-water escaped and damaged the cargo, the House of Lords held that the damage was within the exception "dangers and accidents of the seas." Lord Halsbury said: "I think the idea of something fortuitous and unexpected is involved in both words, 'peril' or 'accident'; you could not speak of the danger of a ship's decay; you would know that it must decay, and the destruction of the ship's bottom by vermin is assumed to be one of the natural and certain effects of an unprotected wooden vessel sailing through certain seas . . . . and I think in this case it was a danger, accident, or peril, in the contemplation of both parties, that the sea might get in and spoil the rice. I cannot think it was less such a peril or accident because the hole through which the sea came was made by vermin from within the vessel, and not by a sword-fish from without—the sea-water did get in." And Lord

(1) 12 App. Cas. 503, 514. (2) 12 App. Cas. 518, 524, 530.

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Herschell: "It arose directly from the action of the sea. It was not due to wear and tear, nor to the operation of any cause ordinarily incidental to the voyage and therefore to be anticipated."

In *Blackburn's* case (1) an engineer having opened the sea-cock with the intention of filling the ballast tank, inadvertently opened the wrong valve and thereby introduced water to the deep tank where bags of sugar were stowed, thus damaging the sugar. After a lengthy review of the authorities, Walton J., a great master of mercantile law, held, following *The Xantho* (2) and *Hamilton* v. *Pandorf* (3), that the occurrence was accidental and the danger maritime, since it was a danger that sea-water should come in, and, therefore, that the loss was by a "peril of the seas."

In *Mountain* v. *Whittle* (4) a houseboat towed by a large and powerful tug sank as the result of the towage because water entered through some of her side seams which proved to be defective. The House of Lords held that the houseboat was lost by a peril of the sea, but it is important to observe that in the opinions delivered much stress was laid upon the fact that the tug was of disproportionate size and power, and that the breast-wave caused by the towage was accordingly in excess of what might reasonably have been expected. It is also important to remember that the policy upon which the houseboat was insured was a time policy, so that the unseaworthiness of the vessel which was found as a fact offered no defence to the claim. Save for the unusual and unexpected size of the wash or breast-wave it would have been extremely difficult to distinguish this case from *Sassoon's* case. (5)

It results plainly from the total of these authorities that exceptional violence of winds and waves is not essential to a "peril of the sea," and *Hamilton* v. *Pandorf* (6) and *Blackburn's* case (1) show that not only need the violence not be exceptional but that there need be no violence at all. The quiet

(1) [1902] 1 K. B. 290.
(2) 12 App. Cas. 503, 514.
(3) 12 App. Cas. 518, 524, 530.
(4) [1921] 1 A. C. 615.
(5) [1912] A. C. 561.
(6) 12 App. Cas. 518.

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undisturbed flow of perfectly calm water into a ship may be a peril of the sea if it enters fortuitously and not, as in *Sassoon's* case (1), because it was the inevitable consequence of exposing the vessel to the action of water.

Sir Robert Aske rightly claimed *Grant's* case (2) as the spearpoint of his argument. The action of sea-water in calm conditions on a body designed to work in such water does not produce a peril of the sea. I agree, but only when the element of the fortuitous is excluded, as it was in that case by the finding of the Board.

Let us turn again at long last to the *Stranna*. There is here no violence of wind or wave, the agency causing the vessel to heel was human rather than elemental—namely, the addition of deck cargo. But are these matters the ultimate test of a peril of the sea? Was this "damage of a character to which a marine adventure is subject?" For my part it seems to me that it was. "Such an adventure," said Lord Herschell in *Thames and Mersey Marine Insurance Co., Ld.* v. *Hamilton, Fraser & Co.* (3) "has its own perils, to which either it is exclusively subject or which possess in relation to it a special or peculiar character." I cannot shut out from my recollection that I spent a pleasant morning during the hearing of this case in renewing and reviving my notions of the factors governing the stability of a ship, under able tutelage from both sides. May I not ask why? Is not the stability of a ship a special branch of marine knowledge? Is it not a feature, sometimes (fortunately at rare intervals) a sinister feature, of every marine adventure? To my thinking the answers to these questions are very clear, and I would go further and fit the whole of Lord Herschell's tests to this case. It is true that I do not know exactly how this casualty was caused, but I do know that unseaworthiness is not suggested. Either the cargo was badly stowed, or parts of it were wet which caused an uneven and uncalculated distribution of weights, or the tanks, which form so important a part in the stability of the vessel, were mismanaged, or some other factor

(1) [1912] A. C. 561.
(2) [1920] A. C. 162.
(3) 12 App. Cas. 484, 498.

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which has occurred to nobody's mind so affected her stability as to cause her to heel in an unexpected manner. It seems to me that it matters nothing how this particular heeling was produced; the ultimate facts are the same. A vessel in water took a wholly unexpected (that is fortuitous) list or series of lists and cargo was thereby lost. In my eyes, following Lord Herschell, this is "damage which has been caused by the sea": it is "damage to which a marine adventure is subject": it is damage by a peril to which marine adventures are "exclusively subject" and which possesses in relation to them a "special and peculiar character." Although it is right in one sense to say that the heeling was produced by a human agency in that it resulted from cargo being put on board, it is to be observed that this heeling was not only undesigned but was the exact reverse of the effect desired and designed.

Finally, there is, I think, significance to be attached in this case to the words "ports of loading" which occur in the bills of lading. Before now, in a hurricane, vessels have broken adrift and thereby suffered heavy damage in a port of loading. Buoys have come adrift from their moorings and vessels lying at the buoys have been damaged. But apart from cases of extraordinary weather it seems difficult to me to imagine a case more exactly fitted than this one to a peril of the sea or accident of the sea occurring in a port of loading.

Since this case may go higher and I may prove to be wrong in my determination of the first point, I think it is due to the parties that I should also express my view as to the second point raised by Mr. Willink. I would gladly have refrained from doing so. It is true that I am relieved by Lord Wright's judgment in *Svenssons'* case (1) from the initial difficulty as to the meaning of the words "at charterer's risk" standing alone. As Lord Wright gave his judgment as a judge of first instance I suppose it would be my duty to express any doubts I might feel concerning it. I have no such duty because I have no doubts. But I have very

(1) [1932] 1 K. B. 490.

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considerable hesitation in expressing my view as to the question of negligence in this case.

I observe with some relief that both Branson J. and a Court of Appeal (Lord Wright M.R., Romer L.J., and Macnaghten J.) in *Brook's Wharf and Bull Wharf, Ld.* v. *Goodman Bros.* (1) expressed a view concerning the onus of proof resting on a bailee who had lost the goods entrusted to him, which seems to be in accordance with an earlier decision of my own in *The Kite.* (2)

In *Brook's Wharf and Bull Wharf, Ld.* v. *Goodman Bros.* (1) a remarkably clever gang of fur thieves had succeeded in abstracting a consignment of Russian squirrel skins from a bonded warehouse. The trial judge, Branson J., was satisfied that the warehousemen had taken all reasonable precautions to guard against theft, and Lord Wright, in delivering the judgment of the Court of Appeal, confirmed that finding. Founding himself upon statements of Lord Loreburn and Lord Halsbury in an unreported case in the House of Lords, *Morison, Pollexfen & Blair* v. *Walton,* and upon a particularly helpful passage from Lord Dunedin in a dissenting judgment in *Ballard* v. *North British Ry. Co.* (3) Lord Wright held that in the circumstances the warehousemen had discharged the burden of proof which lay on them to give an explanation of how the loss could have occurred without negligence.

My decision in *The Kite* (2) was founded upon the same opinion of Lord Dunedin, and although I am confident that my view was covered by his words, I appreciate that the Court of Appeal were on more certain ground in their case than I was in *The Kite.* (2) Lord Wright stated in terms in his judgment that the Court was satisfied that the warehousemen "had taken all reasonable precautions." It follows that they were not negligent. In *The Kite* (2) I could only find that upon the explanation furnished by the bailees the accident was equally as consistent with no negligence as with negligence —there was no preponderating probability one way or the other—and I held that this satisfied the onus on them. This

(1) [1937] 1 K. B. 534.
(2) [1933] P. 154.
(3) 1923 S. C. (H. L.) 43, 54.

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appeared to me to be the meaning which Lord Dunedin attached to " explanation " as distinguished from " proof." The bailees had not to disprove negligence—they had to give an explanation.

Applying this line of thought to the present case I am at once confronted by the difficulty that the explanation given by the shipowners is exceedingly meagre. Their theory of cross-currents is quite untenable, and their evidence at the best leaves the cause of the heeling completely unexplained. Mr. Willink urges that, although the words deck cargo " at charterers' risk " do not excuse the shipowners for negligence proved and determined, they will avail to put upon the goods-owner the risk of loss through unascertained causes. As to this I feel that the statement is too wide. I can quite easily read the words at " charterers' risk " to mean that the goods-owner takes the chance of some imperfectly ascertained causes of loss. But to say that it confers on the shipowners a right to claim exemption from liability in every case in which the cause of the loss is unknown seems to me to be altogether too benevolent a construction in favour of the party who has inserted the exception. Pushed to its logical conclusion this argument would appear to go to the length of saying that these words excuse a bailee from giving any explanation of the loss of goods entrusted to him. Indeed he might well deem it wiser not to attempt an explanation since without one he must succeed.

As usual, in cases of onus of proof, *The Glendarroch* (1) was much canvassed before me. I cannot think that this decision is very helpful in the present case. It must be remembered that in *The Glendarroch* (1) the hearing in the Court of first instance was purposely confined and restricted, and the Court of Appeal were only called on to deal with the position of the parties before any inquiry into the question of negligence had begun. It was a case of damage and not a case of loss, and the decision only established that where a bill of lading contained an exception of perils of the sea, but no further limitation of negligence, there was no burden upon the shipowner to disprove negligence. I do not see how this

(1) [1894] P. 226.

perfectly unassailable decision throws much light on either the construction of the phrase " at charterers' risk " or upon the burden of proof thereunder.

The defendants in the present case have essayed an explanation of the heeling of the *Stranna* which I cannot accept, and they have put forward as a conceivable alternative to this theory, and to negligence on their part, that the wood was so weighted by wet as to render it out of the power of a reasonable and prudent seaman to load it without damage and loss. In support of their care in loading they gave me evidence of testing the effect of what they were proposing to do by hanging certain weights of cargo in slings over the ship's side. This evidence was anything but clear in the result, and I do not feel at all satisfied that the tests spoken to were carried out at the times deposed to or with the weights stated. I am ready to believe that some experiments were made at some period of the loading, but if the facts spoken to in evidence are to be taken as true, the heeling of the *Stranna* almost immediately afterwards would not only be a mystery—it would be a miracle.

In the result, I do not think that the defendants have succeeded in providing an explanation which is in any sense comparable in probability with the probability of their own negligence. The loading of timber cargoes on deck is admittedly a difficult process. The preservation of a ship's stability during this process may be a matter of nice calculation. But one cannot pretend ignorance of the fact that both the process and calculation are being successfully accomplished practically every day, and that the comparatively rare cases of failure are usually due to carelessness or to a fairly elementary blunder. If the facts were otherwise, the carriage of timber cargo upon deck would have earned an unpopularity, at least among underwriters, which it does not appear to enjoy, and it is unlikely that the construction of the now familiar phrase " at charterers' risk " would have been delayed as late as the year 1937.

On the second line of defence put forward by Mr. Willink I have accordingly reached the conclusion, though not without

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some doubt and hesitation, that, in the absence of a reasonably probable alternative explanation, the heeling of the *Stranna* was caused by negligence for which the shipowners are not protected by the words "at charterers' risk." As, however, they are protected by their first defence the plaintiffs' claim fails.

Solicitors for the plaintiffs : *Waltons & Co.*
Solicitors for the defendants : *William A. Crump & Son.*

E. C. M. T.

MORTON *v.* MORTON, DALY AND McNAUGHT.

1937
March 11, 12.

Divorce—Practice—Evidence—Cross-examination—Respondent and two Co-respondents—No denial by Respondent of adultery charged with one Co-respondent—Cross-examination of Respondent as to adultery not denied by her—Effect of general denial of adultery by Respondent—Evidence (Further Amendment) Act, 1869 (32 & 33 *Vict. c.* 68), *s.* 3—*Supreme Court of Judicature (Consolidation) Act*, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 198.

The Judicature (Consolidation) Act, 1925, s. 198, provides that "no witness in any proceeding (instituted in consequence of adultery) whether a party thereto or not shall be liable to be asked or be bound to answer any question tending to shew that he or she has been guilty of adultery unless he or she has already given evidence in the same proceedings in disproof of the alleged adultery." This section means that unless and until the husband or wife as the case may be has denied the adultery with regard to which cross-examination is to be directed there is no right of cross-examination as to that particular adultery. A result is that in a case where there are two co-respondents to a petition and a respondent wife gives evidence denying adultery with one of them, but gives no evidence with reference to the charge of adultery with the other of them, although also pleaded, she does not expose herself to cross-examination as to the latter adultery. If, however, a party gives evidence denying adultery in general, cross-examination may be directed to that general denial. The earlier cases of *Brown* v. *Brown and Paget* (1874) L. R. 3 P. & M. 198, and *Allen* v. *Allen and Bell* [1894] P. 248, 254, and the earlier statute, the Evidence (Further Amendment) Act, 1869, s. 3, now repealed by the Judicature (Consolidation) Act, 1925, on which these cases were decided, distinguished.

Husband's Petition for dissolution of marriage on the ground of the adultery of the respondent wife with two named co-respondents and by amendment of the petition with a man unknown. The respondent and the co-respondent Daly filed answers. The co-respondent McNaught neither appeared nor answered nor gave evidence. There was evidence aliunde that McNaught had confessed his adultery and the Court believed this evidence as against McNaught, but there was no independent evidence against the respondent of the same adultery. The respondent and Daly both gave evidence on the charge against them, denying it. The respondent did not give evidence in her examination in chief with reference

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to the charge against McNaught or as to the charge with a man unknown.

L. F. Sturge for the petitioner. I desire to cross-examine the respondent on the charge of adultery with McNaught with which she is charged in the petition, whether she now denies it or not. I rely upon *Brown* v. *Brown and Paget.* (1) As the respondent has given evidence denying the charge of adultery with Daly she is liable to be cross-examined on any charge made in the petition. *Allen* v. *Allen and Bell* (2) in the Court of Appeal is to the same effect as *Brown* v. *Brown and Paget.* (1)

[He also referred to Rayden and Mortimer on Divorce, 3rd ed., p. 276, and Brown and Latey on Divorce, p. 295.]

J. F. Alexander for the respondent.

The co-respondent Daly in person.

THE PRESIDENT ruled that unless the respondent gave evidence in chief in disproof of the charge of adultery with McNaught she could not be cross-examined with reference to it.

The hearing proceeded, the respondent giving no evidence in chief or cross-examination as to the charge in question; nor did she deny adultery generally. She only dealt in her evidence with the charge with reference to Daly.

In the course of his judgment THE PRESIDENT (SIR BOYD MERRIMAN) said: This is a case which for several reasons has caused me some anxiety, and I am very much obliged to counsel on both sides for putting the case so clearly before me.

It is a charge by a young husband against a young wife. The parties were married in October, 1932, at the ages of twenty-three and twenty-two respectively. The husband charges the wife with adultery with two named co-respondents and with one person unknown. As regards the co-respondents

(1) L. R. 3 P. & M. 198. (2) [1894] P. 248, 255.

who are named the position is this: one of them, a young man named McNaught, has neither entered an appearance nor has he filed an answer, and consequently by the ordinary rules he is debarred from taking any part in the proceedings. He has, of course, at any moment, only to ask for leave to appear and enter an appearance in order that he may defend himself, but this he has not done. But he has been in Court for the greater part of the trial, and it was evident that it was originally intended to call him as a witness against the wife; but that was not done, for reasons which will appear in a moment. The other named co-respondent has appeared and filed an answer, and has given evidence on his own behalf. The wife appears by counsel and has also given evidence and called a witness. This is a case in which I should think it right, as indeed I always do, almost without exception, to allow either respondent the opportunity of cross-examining the other respondent on the evidence which was given.

Now, I am going to deal first with the curious situation—curious, but perfectly logical—which has arisen with regard to the co-respondent McNaught. With regard to him, there is evidence, not merely by the husband but by the solicitor's managing clerk, of an unqualified, detailed, and explicit confession of adultery with the wife on a date when admittedly this particular co-respondent was staying in the home of this young couple and on an occasion when he failed to leave the house at the same time as the husband left it in the morning. According to his story, he was still in bed in a room in which the bath was contained, and the wife came in in her nightdress, and having bathed the baby, in effect seduced the co-respondent. The effect of the story is that it was all really her prompting, though that was not said in so many words. But whether that is so or is not is irrelevant; the co-respondent committed adultery. It weighed on his mind, and when he heard of these proceedings he came and told the husband so. He was then taken by the husband to the solicitor, who took his proof in a perfectly correct way. The solicitor's managing clerk warned him of the situation in which he was placing himself, and that he would inevitably be made a co-respondent.

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It was explained to him perfectly correctly exactly what the legal position was ; the whole thing was done with scrupulous fairness, and the clerk who was called repeated in detail the whole of this story. I have not the slightest hesitation in believing it as against the co-respondent. But I have had occasion more than once to explain to juries, and I must now explain to myself, what the law on this subject is ; adultery, like any other charge which is made, is one which has to be proved, and proved by evidence, and that means evidence which is admissible against the particular party. Neither of these two confessions, made first to the husband and secondly to the solicitor's clerk, was any evidence whatever against the wife, though both of them were evidence against the co-respondent himself. In order to make them evidence against the wife the husband could have called the co-respondent as a witness against the wife after a proper warning given to him. He did not do so. He explained that he did not do so because when served with the subpœna the co-respondent was abusive and made it quite clear that he would go back on what he had said. Well, that may or may not be a good reason for not calling him. There are, of course, steps which can be taken in certain circumstances with regard to witnesses if the Court is satisfied they are being recalcitrant ; in other words to treat them as hostile witnesses. It is an extreme course and one which anybody might well shrink from taking with regard to a man who is himself accused, and needless to say, if any such course was proposed I should have had to warn the man very clearly indeed that he was under no necessity to expose himself to that position if he did not wish it. But still, it was not an absolutely insuperable difficulty in certain circumstances. However, counsel for the husband decided not to call him, and by that decision the case with regard to McNaught rests in this way : I am obliged to find, as I do, and as I should be obliged to direct a jury to find, that there was no evidence that the wife has committed adultery with this co-respondent, but there is evidence that the co-respondent has committed adultery with the wife. It is perfectly logical ; that decision means not that what is in

effect the same act was committed by the one person but was not committed by the other, it means that it is proved against the one but it is not proved against the other. That is the basis on which the law is administered; cases are decided upon proof and not upon suspicion and hearsay evidence. Whatever the result may be as regards the co-respondent so far as that charge is concerned, it is impossible for me to pronounce a decree upon it as against the wife.

Before I go on to deal with the rest of the case I want to say one other thing about the other matter. With this position about the co-respondent McNaught in mind it was quite plain at the end of the husband's case that there was no evidence against the wife on that charge, and counsel for the petitioner quite freely admitted that was so. But as the wife's counsel was proceeding to examine her with regard to McNaught, having dealt with the case between her and Daly, I thought it right to call his attention to the position as it then was. It was then intimated, however, that an attempt might be made to cross-examine the wife about the charge in connection with McNaught whether she gave any evidence about it or not. I intimated quite plainly what view I should take of any such attempt, and I repeat that which I have said in many cases before; in my opinion, s. 198 of the 1925 Act (which permits not for the first time in the history of statute law, a husband and a wife to give evidence in divorce proceedings), in providing that no witness, whether a party to the proceedings or not, shall be liable to be asked or bound to answer any questions tending to show that he or she has been guilty of adultery unless he or she has already given evidence in the same proceedings in disproof " of the alleged adultery," means that unless and until the husband or wife, as the case may be, has denied the adultery with regard to which the cross-examination is to be directed there is no right to cross-examine as to that particular adultery. In this case, as I have already pointed out, there is a general charge of adultery; and there is a charge of adultery with one co-respondent and there is a charge of adultery with another co-respondent. At the time this question arose the only evidence the wife

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had given was a denial of her adultery with Daly. Now, the Matrimonial Causes Rules are quite explicit that if it is intended to allege adultery and there is a known co-respondent, that co-respondent must be named, served and given an opportunity of appearing and defending the proceedings. On the wording of the present statute, whatever may have been decided on the wording of any earlier statute, I take the view—which, as I say deliberately, is shared by the other judges of this Division—that " the alleged adultery " in this statute means adultery with the particular co-respondent. If the party has given evidence denying adultery in general, then, of course, cross-examination may be directed to that general denial; but so long as the denial is limited to a denial of adultery with a particular co-respondent, in my opinion, under the present statute, the respondent does not expose himself or herself to cross-examination with regard to adultery with another co-respondent although that adultery is also pleaded. I mention this because it was as a result of the discussion on this point that the wife was in fact never asked any questions in disproof of her alleged adultery with McNaught, nor was she asked any questions in disproof of adultery generally; she only dealt with the specific charge of adultery with Daly.

His Lordship made a finding of adultery against the respondent and the co-respondent Daly and pronounced a decree nisi thereon.

Solicitors for the petitioner: *Andrew, Purves, Sutton & Creery.*

Solicitors for the respondent and co-respondent Daly: *Lawrence Dennis & Co.*

R. M. M.

GREENWOOD *v.* GREENWOOD.

1937
April 29.

Divorce—Petition by wife—Deeds of separation—Unreasonable delay—Connivance—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 178, *sub-ss.* 2, 3 (*a*).

A wife, desirous that her husband should return to her, continued for thirteen years to receive an allowance from him knowing at all material times that he was living with another woman. She then filed a petition for divorce, but was induced to compromise it for an increase in the allowance, fearing that her husband might lose his employment as a result of exposure. After a further lapse of time she accepted a deed of separation with a mutual condonation of past offences and the payment of a lump sum of cash in lieu of maintenance. Having exhausted this provision, she now filed the present petition for divorce :—

Held, that the petitioner was from the date of the compromise of the first petition for divorce guilty of unreasonable delay and also of connivance and that the petition must be dismissed.

Wife's petition for dissolution of marriage.

The parties were married in 1901, and there were two children of the marriage, both now of full age. In 1907 they had entered into a deed of separation with an allowance to the petitioner of 1*l.* per week for herself and the children. By a second deed in 1915 the allowance was increased to 10*l.* per month. From 1907 onwards the respondent to the knowledge of the petitioner had lived in adultery with another woman. From letters put in it appeared that the petitioner was distressed by this association and had hoped that her husband would return. However, in 1920 the petitioner took divorce proceedings on the ground of this adultery. In her evidence the petitioner now said that she took these proceedings to get more maintenance and that she had not cared about a divorce as long as the respondent was willing to pay more. These proceedings were compromised in 1921 by a deed raising her allowance to 450*l.* a year, and the petition was dismissed. In 1933 the petitioner accepted a sum down of 1000*l.* in discharge of all liability of the respondent by a deed which contained a mutual condonation of past offences. Having exhausted this provision she filed the present petition

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in 1936 on the ground of the same, and still continuing, adultery. The answer of the respondent pleaded a general denial of the charge and also unreasonable delay. The denial was withdrawn, and subject to formal proof of the adultery, the only issue for the Court on the pleadings was unreasonable delay.

W. Latey for the petitioner. The delay under the Judicature (Consolidation) Act, 1925, s. 178, sub-s. 3, must be culpable and in the nature of acquiescence: *Rickard* v. *Rickard and Bond* (1); *Tollemache* v. *Tollemache* (2); *Binney* v. *Binney and Hill.* (3) In this case at all events up to 1920 the petitioner continued to hope that the respondent would return to her, but the married life had already been destroyed by the continued association of the husband with another woman. The hope of the petitioner that the respondent would return was meritorious: *Green* v. *Green.* (4) Even if there has been unreasonable delay the Court has still a discretion to grant or refuse relief. Delay may be unreasonable, but still not such as to justify refusal of a decree: *Newman* v. *Newman.* (5) The exercise of the discretion must depend upon all the circumstances of the case.

H. W. Barnard for the respondent. On the facts the conduct of the petitioner goes beyond unreasonable delay and amounts to connivance. Although connivance is not pleaded, the Court is bound by the Judicature (Consolidation) Act, 1925, s. 178, sub-s. 2, to dismiss the petition if it finds connivance as a fact. The execution of a deed of separation at a time when the petitioner knew that the respondent was living in adultery in itself amounted to connivance at the continuance of that adultery: *Thomas* v. *Thomas.* (6)

[LANGTON J. In that case consent of the wife could not be denied. The deed expressly referred to the adultery of the husband.]

So in this case the recitals of the deed have the same effect.

(1) (1921) 37 Times L. R. 511.
(2) (1859) 1 Sw. & Tr. 557, 561.
(3) [1936] P. 178.
(4) (1873) L. R. 3 P. & M. 121, 124.
(5) (1870) L. R. 2 P. & M. 57.
(6) (1860) 2 Sw. & Tr. 113, 117.

The strongest case that the petitioner can rely on in which a decree has been granted in circumstances approaching the present is *Higgins* v. *Higgins* (1), and even in that case, although on the facts a decree was granted by the Court of Appeal, Pollock M.R. distinguished the case of a wife who may be said to have been guilty of "anticipatory" connivance by executing a deed of separation when the husband has been living with a certain woman and may be expected to intend to return to her.

LANGTON J. This is a very sad case indeed, and nobody who has heard the life story of the petitioner in this case could fail to be moved by the fact that she has had a very sad life. She finds herself now, at the age of sixty-five, completely destitute. Even if one were to take against her the fact that that position was contributed to by her own action, that would not much detract from the sympathy which we must feel for her in her misfortune.

The parties were married as long ago as the year 1901. They had two children, who have attained maturity and are now aged respectively thirty-four and thirty-two. During the early stages of their married life there was trouble between the parties, and in the year 1907 they entered into the first of a series of deeds of separation. By this deed, dated March 20, 1907, there was a provision of a most exiguous character—namely, 1*l.* a week for the wife for the support of herself and her two children. In the ensuing years between 1907 and 1915 Mrs. Greenwood went into service as a dressmaker, and no doubt must have experienced a very rough time. In 1915 her husband appears to have acquired a greater degree of prosperity, and in consequence, by a deed of March 3, 1915, a much better provision was made for Mrs. Greenwood, and she was provided for to the extent of 10*l.* a month. During all the years since 1907 to 1915, the respondent, Mr. Greenwood, was living with the lady who is named in this petition, a Miss Wall. The fact that Mr. Greenwood was living with Miss Wall was well known to Mrs. Greenwood from the inception of the

(1) (1924) 41 Times L. R. 25.

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period dating from 1907. At first, during the early years, Mrs. Greenwood undoubtedly felt keenly about the position of her husband and Miss Wall. There are letters of hers which show just how keenly she felt, and there are letters of hers as late as 1915 which show that she had still not abandoned hope that her husband might return to her. From 1915 until about 1920 her husband maintained these payments at the rate of 10*l.* a month and Mrs. Greenwood accepted them, as indeed she was forced to do. In the year 1920, however, Mrs. Greenwood took a new step. She decided to institute divorce proceedings against her husband, and launched her petition against him on the grounds of adultery and cruelty. Again Miss Wall figures in that petition. He was, I think, at that time in some arrears under the deed, but he held a position—this has been given in evidence and not challenged—of considerable responsibility and well remunerated with a well known commercial firm. Mrs. Greenwood's evidence as to why she acted as she did at that time was this. She said: "I petitioned for divorce in the year 1920. I thought it was necessary; he was doing so well. Everything was so expensive and I had a right to have my rights. I brought divorce proceedings to try to get a better maintenance. I did not care one way or the other about the divorce, so long as he was willing to pay more money." In cross-examination by counsel for the respondent she said that when she compromised those proceedings, as she subsequently did, "I presumed he would go on living with Miss Wall. I did not care a bit." Similarly she said with regard to the last of the series of deeds: "I did not mind a bit whether he went on living with her or not." Those proceedings, initiated in 1920, were compromised by another deed of May 26, 1921. By the provisions of that deed, Mrs. Greenwood was to receive an accession of her allowance to such an extent that it would thereafter amount to 450*l.* a year, a very considerable accession from the antecedent position when she was receiving only 120*l.* a year. It is abundantly clear, from the passages I have cited, what Mrs. Greenwood's attitude towards her husband was then, in

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1920. She knew full well that her husband intended to go on living with Miss Wall, and, as she herself expressed it, she did not mind a bit. She brought proceedings to get what she thought were her rights and in order to better her financial position. She was induced, she says, to compromise those proceedings by the argument that her husband, being as he was in a responsible position with a commercial firm, might well lose that position if the facts were ventilated in open Court and it became known to his employers that he was living with a woman who was not his wife, and he had this general stigma upon him. I can well believe that that argument weighed with Mrs. Greenwood. She realized that if she were to go on with her proceedings she might well obtain a divorce, and, on the subsequent application for maintenance, find that she had cut the ground from under her feet and be unable to get any maintenance from a man who had lost his position. It is right also, I think, that I should say that she is not to be judged too harshly for taking the attitude she did in a position of very great difficulty; but I have to consider it, not from a moral point of view—that is not my concern—but entirely from the point of view of the English divorce law. I have to address my mind to this petition as it stands to-day. Now from the year 1921 to 1932, Mr. and Mrs. Greenwood seem to have seen next to nothing of one another; but Mr. Greenwood continued to pay an allowance of 450*l.* a year. In the year 1932, Mr. Greenwood resigned from his lucrative position and his financial situation became sensibly worse. In those circumstances, negotiations were put on foot to induce Mrs. Greenwood to accept a somewhat smaller allowance. It was suggested that, instead of 450*l.*, she should agree to take 300*l.* a year, in consequence of the change in her husband's fortunes. Mrs. Greenwood, who had already incurred the expense of a larger house, found it impossible to cut down her expenses as quickly as that change in her fortunes would dictate. An alternative proposition was made to her that, instead of taking in future an allowance of 300*l.* a year, she should accept from her husband, in final discharge of all liabilities towards her, a lump sum of 1000*l.* She was

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advised at that time, not only by a solicitor, but also by counsel, and it is not at all surprising to learn that both solicitor and counsel advised her against accepting that proposition. Mrs. Greenwood, who to her credit gave her evidence before me with complete candour and disarming frankness, said at once that the advice had been tendered to her, that she had rejected it and had acted upon her own opinion. She thought that she could do better with the 1000*l.* She accepted the 1000*l.*, invested 500*l.* of it, and lived on the rest. What exactly was the fate of the investment, I do not know; but the investment now is, I understand, worth nothing at all. So the result is that to-day Mrs. Greenwood, at the age of sixty-five, finds herself completely destitute. In those circumstances, she brings her petition against her husband, alleging his long continued adultery with Martha Wall, and the answer, not an unnatural one in the circumstances, is that there has been unreasonable delay. Actually a plea of denial was put in; but counsel withdrew that at once and said his whole case on the answer was unreasonable delay, which is the issue presented to me and the issue which I have to try: Is this a case of unreasonable delay or not?

The parties have been separated for approximately thirty years. Throughout those thirty years, Mrs. Greenwood has been actively aware, or passively conscious in the sense that she took no kind of step to discover whether it was so or not, of the fact that her husband has been living in adultery with Martha Wall. She has at various stages, as I have recited, by a series of deeds, attempted to secure for herself what she thought was a fair provision. Whether she has been actually successful in so doing, I could not possibly judge without knowing all the financial circumstances of Mr. Greenwood, of which at present I am imperfectly informed. But Mrs. Greenwood has not lacked skilled professional assistance in putting forward her claims to her husband. I think it may, therefore, be presumed that she has got at any rate a reasonable share of that to which she was entitled as Mr. Greenwood's wife. Now I can pass over the three earlier

deeds and come to the final deed of June 23, 1933. In that deed there was a provision, clause 4: "Neither the husband nor the wife shall require or compel or endeavour to compel the other of them to cohabit or dwell with him or her by any legal proceedings for restitution of conjugal rights or otherwise howsoever or to take any proceeding against the other of them to obtain a divorce or judicial separation in respect of any misconduct which has heretofore taken place, or is alleged to have heretofore taken place, on the part of the other of them." Now, on the strength of that provision, counsel for the petitioner argued that the date of Mrs. Greenwood's acquiescence in the position of her husband, that is to say, the date from which one should reckon any delay, was the date of this deed, June 23, 1933. He said that if that was an agreement to wipe out marital offences up to that date, Mr. Greenwood could not be heard to approbate and reprobate the same deed, and, therefore, having created a position of artificial innocence by this clause, he could not afterwards plead in bar his own continued turpitude. It became, therefore, necessary to examine this clause with some care. Counsel was immediately driven to agree that no such phraseology could be found in the deed. The clause did not contain any actual reference to defence to, or bar of, any proceedings but dealt only with the commencement or initiation of proceedings. It provided in terms that neither the husband nor the wife should take proceedings to obtain a divorce in respect of anything that had theretofore been done. Counsel had, therefore, to rely upon implication, and to say that there was something implied in these words—namely, that if two parties agree not to begin proceedings, they impliedly agree not to defend them. That position counsel ultimately abandoned. He based a stronger argument upon the matter of discretion. This question of unreasonable delay is a matter which is, by s. 178 of the Judicature Act, 1925, left in the discretion of the Court. The Court is not bound to dismiss a petition merely because there has been a degree of delay. It is left in this position, that the Court is not bound to pronounce a decree if it finds a petitioner

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has during the marriage been guilty of adultery, or in the opinion of the Court has been guilty of delay in presenting or prosecuting the petition. Bucknill J. quite recently pointed out in 1936, in the case of *Binney* v. *Binney and Hill* (1), that this discretion, like other discretions, must be judicially exercised. Because the matter is left in the discretion of the Court, it does not mean that the Court is free to do exactly what it chooses, to indulge in sympathies or to invent some new equitable doctrine between the parties. It means that discretion is to be exercised upon judicial grounds in accordance with the principles that have been recognized in this Court. I have, therefore, to approach this case from the point of view of judicial discretion, and see whether it is right that judicial discretion should be exercised in favour of Mrs. Greenwood against her husband after thirty years of delay. It occurred to me, on examining various authorities, that Mrs. Greenwood's action after a certain point, not before 1915, not I think before 1920, but after a certain point, might well be classed as connivance. She knew in 1920, with plenty of skilled advice, exactly what she was doing. She knew, as perhaps her legal advisers did, that her husband was living with this woman, and was quite certain that he would continue, as far as she knew, to live with her. Nevertheless she, with her eyes open to the position, made her bargain. As I have said before in this judgment, it is not for me to express any opinion on the morality of such a bargain. She had had a hard life, she was placed in a very hard position, and I am concerned only with the legal side. Legally, did she connive or did she not ? I have considerable guidance from the old case of *Thomas* v. *Thomas*. (2) It is a decision in the year 1860. True that is a long time ago. The circumstances are not really very dissimilar. The husband and the wife in that case had executed a deed of separation, and had executed it with full knowledge of the facts. It was recited in the deed that the husband was living in adultery with another woman. Having executed this deed and having taken benefits under it, the lady came, some six years afterwards, and

(1) [1936] P. 178. (2) 2 Sw. & Tr. 113, 117.

claimed a divorce on the ground of her husband's adultery during the two preceding years. The Court, however, held that the execution of that deed was in fact an approval of or a consent to the adultery, and refused the lady relief. Now I agree that none of these cases where one is exercising a judicial discretion are likely to be complete precedents for the case in hand. In these matters the variety of detail is most important and may make the whole difference. I do not know just what was the situation of Mrs. Thomas. She may have been in a more or less independent position, whereas Mrs. Greenwood, the lady in this case, certainly was not. Taking the case as a guide to the manner in which discretion should be exercised, I must say, for my part, I have the gravest difficulty with Mrs. Greenwood's position after 1920 Up to that time, for a certain period at least, she certainly entertained hopes that her husband might return to her. She wrote him letters asking him to do so. After that date she clearly had no kind of hope at all and, as she quite frankly said, did not mind in the least whether he did or did not. She had lost interest in him and was interested only in her own position. Whatever one may think of it one way or the other morally, legally that seems to me to be connivance. I hold that after 1920 this lady connived at her husband's adultery. As counsel for the respondent pointed out very fairly in his speech, connivance is not pleaded by him, but it emerges from the lady's own evidence, and to my thinking, that in law amounts to connivance. Now if that is so, of course, there is no question of the exercise of discretion at all, because connivance is a bar, not a matter for discretion.

The other matter, the question of undue delay, is, to my mind, clearer still. I can well imagine that there might be two opinions about the question of the lady's connivance, especially as she was placed in a situation of very great difficulty; but as to the delay, I find it difficult to imagine that there can be two opinions at all. Once in 1920, and once again in 1933, with the fullest knowledge of all the circumstances, with every expectation that her husband would continue to live in adultery with this woman,

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Mrs. Greenwood, quite calmly, quite deliberately, came to the conclusion that she would prefer that things should remain as they were, so long as she was properly provided for. With every sympathy for her position, I cannot imagine, in those circumstances, that she could be allowed now to change her mind, in the face of the provision that she would take 1000*l.* in full discharge of all her husband's liabilities towards her. It would be odd indeed if she were allowed now to turn round and say: "Well, my speculation or my investment having gone against me, my judgment having been proved to be wrong, I will now change the position which I have allowed him to occupy, a position in which I have acquiesced so long, and I will now come and ask the Court to grant me a divorce in respect of adultery which has continued for thirty years to my knowledge without action on my part save the petition which I compromised in the year 1921." To my thinking, judicial discretion, in those circumstances, can only possibly be exercised in one way, and that is, against her.

In the course of the argument I have heard a statement from the respondent's counsel that her husband recognizes still his duty towards her to save her from the extreme destitution in which she finds herself. I hope that nothing I have said, addressed as it is entirely to the question of law, would serve to deter him from that very desirable line of conduct or weaken him at all in his resolution to do what I am sure the majority of people would think is a moral duty, even if it is not a legal one. I am not here to judge whether he has not still a legal duty to support his wife. He will receive advice about that, and nothing I have said will militate, I am sure, against that advice. I have only to judge of the legal position as regards this petition, and as regards this petition, I hold it fails on the ground of unreasonable delay, and I think it also fails, though with less certainty on the ground of connivance since the year 1920.

Solicitor for the petitioner: *F. G. Huggett.*

Solicitors for the respondent: *Kimber Bull, Howland, Clappé & Co.*

R. M. M.

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May 28, 31;
June 1, 2,
8, 11.

Shipping—Collision in the Thames—Vessel at anchor in improper position athwart fairway—Lights of anchored vessel seen in sufficient time to avoid collision—Failure to appreciate that lights were anchor lights in sufficient time to avoid collision—Contributory negligence.

The plaintiffs' vessel *C.* at anchor in Long Reach, River Thames, was run into by the defendants' vessel *E.* proceeding up the river. The *C.* had her anchor lights exhibited, but she was lying nearly athwart the river with her whole length to the north of mid-channel in such a position that she was obstructing a large part of the fairway. The practice in Long Reach, according to the evidence, was for vessels to anchor to the south of mid-channel, and for large vessels proceeding up and down to pass to the northward.

The defendants' case was that the *C.'s* lights were defective, and that those on the *E.* only saw the dim forward anchor light, and immediately afterwards the hull, of the *C.* about 650 feet away. The Court found, however, that the lights were effective and that they were, or should have been, seen at a considerably greater distance than 650 feet; but that the failure of those in charge of the *E.* to identify the lights as anchor lights in time to avoid the collision was partly due to the *C.'s* improper and unexpected position in the river in a locality where bright lights on the north shore would probably make it more difficult to pick up her lights, and partly to the fact that those on the *E.*, which had a speed of at least 10 knots, were not sufficiently alert as to the possibility of danger ahead:—

Held (i.) that the *E.* was to blame, inasmuch as those in charge of her on seeing the lights should have realized the possibility that they were those of a ship or ships ahead the precise position of which was obscure, and should have reduced the speed of the *E.* immediately; (ii.) but that the *C.'s* negligence in anchoring in an improper position contributed to the failure of those in charge of the *E.* to take appropriate action until it was too late, and that the *C.'s* negligence was wrapped up with and part of the negligence of the *E.* Both vessels therefore were to blame and in equal degrees.

ACTION OF DAMAGE.

The plaintiffs were the owners of the steamship *Corstar*; the defendants were the owners of the steamship *Eurymedon*. The collision occurred on the early morning of January 6, 1937, in Long Reach of the River Thames.

The plaintiffs' case was that the *Corstar*, a steamship 300 feet long, was lying at anchor to the southward of

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mid-channel; the wind was S.S.W., strong, and being wind-rode, the *Corstar* was angled about 3 to 4 points to starboard of a down-river heading. Her regulation lights for a steamship at anchor were duly exhibited and burning brightly. In these circumstances the masthead lights and the red light of the *Eurymedon*, coming up river in about mid-channel, were observed distant about a mile and bearing a little on the port bow. Instead of passing all clear to the northward, however, the *Eurymedon* came on and swinging rapidly to starboard at the last with her port quarter struck the port quarter of the *Corstar*, doing damage.

According to the defence, the *Eurymedon*, a twin-screw motor vessel bound from Amsterdam to London, part laden, was on an up river course, to the northward of mid-channel, and with engines working at half-speed ahead was making about seven to eight knots, when a dim white light, which proved to be the forward anchor light of the *Corstar*, was seen distant about a cable or a little more and bearing about 1 to 1½ points on the port bow. Almost immediately afterwards the outline of the *Corstar* was made out lying athwart the river right across the head of the *Eurymedon*, and a very dim white light was also made out aft on the *Corstar*. The wheel was immediately put hard-a-starboard, one short blast was sounded on the whistle, the engines were stopped and put full speed astern, and three short blasts were sounded on the whistle. The head of the *Eurymedon* swung clear of the stern of the *Corstar*, and the wheel was then put hard-a-port in an endeavour to swing her stern clear of the *Corstar* and also to prevent her head from fouling the steamship *Corchester*, which was lying at Cory's jetty on the north side of the river. In spite of these manœuvres, however, it proved impossible to prevent the port side fouling the stern of the *Corstar*, and at the same time the starboard bow of the *Eurymedon* came into contact with the starboard side of the *Corchester*.

The defendants alleged that those in charge of the *Corstar* failed to exhibit anchor lights of sufficient brightness; that they failed to anchor on the south side of the river, and caused or allowed the *Corstar* to lie athwart the fairway and in a

position where her lights were liable to be confused with surrounding shore lights.

K. S. Carpmael K.C. and *Owen L. Bateson* for the plaintiffs. The only question is whether the *Corstar* was showing proper anchor lights. Even if they were only seen a quarter or half a mile away, and (contrary to the plaintiffs' case) the *Corstar* was anchored too far to the northward, the *Eurymedon* could easily have avoided the collision and is alone to blame. If, as alleged by the defendants, the *Corstar* was in a position where the glare of lights from the north shore made it difficult to pick up lights on the water it was all the more necessary to keep a vigilant look-out and to be going at a moderate speed.

H. G. Willmer and *Vere Hunt* for the defendants. The *Corstar* was anchored in a dangerous and improper position athwart the course of large vessels proceeding up and down. Four vessels had to take sudden action for her and only saw her lights at a very late moment. The position in which she was made it difficult to pick up her lights even if they were burning brightly. It is improper and unseamanlike for a vessel to lie at anchor across the fairway: see *The Trentino* (1); the recognized anchorage for vessels in Long Reach is off the south shore. The statement in Marsden's Collisions at Sea, 9th ed., p. 445, that if there is no rule or custom requiring a vessel to bring up out of the fairway she may anchor there, although directly in the track of shipping, is unsound. The authority quoted for the proposition is *The Lancashire* (2), but in that case the ferryboat which ran into the anchored vessel in a fog had been warned that there was a vessel athwart her course anchored in the fairway. The speed of the *Eurymedon* is quite immaterial; she had no reason to expect a trap, she was taken by surprise and took proper action as soon as she became aware of the presence of the *Corstar* athwart the fairway.

[Reference was also made to Stuart Moore's Rules of the Road at Sea, p. 83.]

(1) (1937) 57 Ll. L. R. 121, 124, 126.
(2) (1874) L. R. 4 A. & E. 198.

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Carpmael K.C. replied.

Cur. adv. vult.

1937. June 11. BUCKNILL J. read the following judgment: This case arises out of a collision between the plaintiffs' steamship *Corstar* and the defendants' steamship *Eurymedon* in Long Reach of the Thames shortly after 6 A.M. on January 6, 1937.

The weather, as I find at the time of the collision, was overcast with rain, and the wind was south-westerly and force about six. The tide was the last quarter flood and force about a knot.

The *Corstar* is a screw steamship 300 feet long and 45 feet beam. The *Eurymedon* is a twin-screw motor ship 431 feet long and 54 feet beam. The *Corstar's* case is that at the time of the collision she was at anchor to the southward of mid-channel, angled 3 to 4 points off a down river heading, and was exhibiting two riding lights in accordance with No. 14 of the Thames Bye-laws. The bye-law requires a vessel of 150 feet in length or upwards to exhibit in the forward part of the vessel at a height of not less than 20 feet and not exceeding 40 feet above the hull a white light in a lantern so constructed as to show a clear uniform and unbroken light visible all round the horizon at a distance of at least one mile, and to exhibit at or near the stern at such a height that it shall not be less than 15 feet lower than the forward light another such light. The interpretation clause of the bye-laws states that the word "visible" when applied to lights means visible on a dark night with a clear atmosphere.

On the other hand, the defendants' case is that the collision occurred well to the northward of mid-channel, and that the *Corstar* was improperly at anchor in the fairway and lying athwart the river and was not exhibiting riding lights of sufficient brightness to comply with the bye-law.

Each vessel sustained damage in the collision. Almost immediately after the collision the *Eurymedon*, which was proceeding up river, collided with the steamship *Corchester*, which was lying alongside Cory's jetty on the north side of

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the Reach and heading down river. The *Corchester* is a vessel of about the same dimensions as the *Corstar*, so that her starboard side was about 45 feet from the edge of the jetty.

I find as a fact that the collision between the *Eurymedon* and the *Corstar* occurred a few seconds before the collision between the *Eurymedon* and the *Corchester*. The *Corstar* was hit on her port counter by the *Eurymedon's* port side about 56 feet forward of the *Eurymedon's* stern. The *Corchester* was hit on her starboard side in the way of No. 4 hatch by the stem of the *Eurymedon*. I find that the angle of the blow between the *Eurymedon's* centre line and the *Corchester's* centre line was about 4 points leading aft on the *Corchester*, and that the angle of the blow between the *Eurymedon* and the *Corstar* was about 3 points leading aft on the *Corstar*.

The collision between the *Eurymedon* and the *Corstar* was of a very slight nature and did not affect the heading of the *Eurymedon*.

I find that at the time of the collision the stern of the *Corstar* was about 350 feet from the edge of Cory's jetty and that the *Corstar* was lying nearly athwart the river and about opposite the eastern end of the jetty. This places the *Corstar's* stern near the northern edge of the deep water channel, and with about 300 feet of the channel occupied by her. The width of this channel at this place is about 1000 feet.

The first and most important issue in the case is whether the *Corstar's* lights were burning properly. Evidence was called and was not challenged that the *Corstar* was exhibiting two riding lights, one at the fore end on the fore stay and one at the stern on the flagstaff, and it was admitted by the defendants that the lanterns and lamps themselves were of the usual and proper pattern for oil riding lights. There is no doubt that if the lamps were properly trimmed and burning proper oil, and if the glass of the lamps and lanterns was clean, the light from them would show at least one mile on a dark night with a clear atmosphere.

The Trinity House pilot in charge of the *Eurymedon* said in his evidence that the first he saw of the *Corstar* was a very dim light bearing about 1–1½ points on the port bow, and

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about 650 feet from his ship. Other witnesses were called from the *Eurymedon* and from other vessels which passed the *Corstar* about the time of the collision, all of whom said that the *Corstar's* lights were dim, or faint or poor.

On the other hand, the plaintiffs called on their behalf three witnesses from the *Corstar*, and two witnesses, one from their jetty and one from the *Corchester*, who said that the lights of the *Corstar* were burning brightly at the time of the collision. So far as the two last witnesses are concerned they are both in the employ of the owners of the *Corstar*, and the *Corstar* was lying at anchor close to them. Therefore they were not in a very good position to judge of the range of visibility of the lights. One of them said that the after light, which was the one nearest to him, was not as bright as the forward light, but still it was a good light.

It seems to me that on this issue as to the condition of the lights of the *Corstar* the determining factor is the value I attach to the evidence of the bosun of the *Corstar*, who trimmed the lights and put them up.

[His Lordship dealt with the evidence of this witness and of others as to the visibility of the lights, and commented on the fact that the pilot of the *Eurymedon*, when he made his report on the day of the collision, made no complaint about the state of the *Corstar's* lights. His Lordship continued as follows :]

Mr. Willmer argued that there was a recognised practice among seamen to take oil anchor lights down at midnight and trim them. The Elder Brethren do not know of any such practice. The advice they have given me as to the range of visibility of these lights is that, without making a test of the lamps under the conditions of this particular night at this particular place, it is impossible to say what the range of visibility of the lights would be, but they say that it is probable that the lamps after burning fourteen hours in a strong wind and rain would not be burning as brightly as when they were put up. The probability of reduction in visibility depends on the tendency of the lamp to smoke and on the tendency of the wick to become clogged and need re-trimming. They also

tell me that so far as Trinity House is concerned their lamps are trimmed after twelve hours. After considering all the evidence on both sides the conclusion to which I have come on this important issue is that the *Corstar* was exhibiting anchor lights which complied with the bye-law and that she is not to blame in this respect.

Mr. Carpmael argued that this was the only point in the case which if decided in his favour must result in the *Eurymedon* being found alone to blame. I do not agree with that contention.

The second issue in the case is as to the position of the *Corstar* at the time of the collision. The pilot of the *Corstar* was called as a witness, and he said specifically and clearly that he anchored the ship to her starboard anchor and 45 fathoms of cable as close as he dared to the south shore and the barge roads, having regard to the necessity for allowing room to swing either way on change of tide. He gave the distance as 300 feet outside the line of barge roads on the south shore, and in a position which puts the *Corstar* about opposite Cory's jetty on the north side of the river. The width of the river at this point between the water alongside the jetty and the buoys on the south shore is about 1450 feet. In this position the stern of the *Corstar*, if swung athwart the river at the full scope of her cable of 45 fathoms on the windlass, would be about 850 feet from the buoys on the south shore and therefore about 600 feet from the edge of Cory's jetty. The master of the *Corstar* put his vessel nearer into the buoys and about 100 to 200 feet outside them. The foreman shipworker at Cory's jetty put the *Corstar* at quite two lengths, i.e., 600 feet, outside the jetty, and the carpenter of the *Corchester* put her at the same distance. I have already found as a fact that at the collision the stern of the *Corstar* was about 350 feet from the edge of the jetty. In my judgment, however, the pilot of the *Corstar* and her master had no accurate recollection of the position in which she was anchored. No records of any bearings were taken. I think they have tried to minimize the distance out from the south shore at which the anchor was dropped. I am advised that there is

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no reason to suppose that the *Corstar* dragged her anchor having regard to the strength of the wind, the nature of the bottom, and her scope of cable; and there is no evidence that she did so except by inference from the change of position as alleged by the plaintiffs to the position at collision which I have found.

I find as a fact that the *Corstar* was lying in a very unusual position. Trinity House pilots from four other vessels which passed the *Corstar* while she was at anchor shortly after the collision all alleged that the *Corstar* was anchored in an improper and dangerous position. "A wicked position from the point of view of traffic up and down the river" the pilot of the *Glenbeg* said. A "cruel position" was the expression used by another pilot. A "very terrible" place was the expression of a third pilot. The substance of the complaint made by these witnesses is that the practice in Long Reach is to anchor vessels to the southward of mid-channel, and that vessels, or at all events large vessels, proceeding up and down river pass to the northward of the vessels at anchor. The pilot who anchored the *Corstar* himself said that the proper place to anchor in Long Reach is well on the south side of mid-channel, but that sufficient room must be allowed to swing either way. As I have already found, the *Corstar* was lying with her whole length to the north of mid-river and athwart the fairway in such a position that she was obstructing a large part of the fairway used by traffic up and down the river. The impression which I formed after hearing the evidence was that the pilots of the *Glenbeg*, *Coptic*, *Mahana* and *White Crest*, all experienced pilots of ships of a substantial size, felt genuinely aggrieved as pilots in charge of the safety of these ships at the position in which the *Corstar* had got, and that they honestly thought she was a danger to navigation in that place and ought not to have been there.

I accept their evidence on this point as quite honest evidence. I do not for one moment think that these pilots have combined to say anything which they do not honestly believe to be true. I think that they were mistaken in saying that the lights of the *Corstar* were dim if by saying that they

meant to allege any positive defect in the lantern or lamp itself. In my view the inference that the lamps were dim has been drawn, and naturally drawn, from the fact that the witnesses did not particularly notice the anchor lights of the *Corstar* until they were comparatively close to her. But in my judgment the reason why they did not identify these lights earlier was because they were not expecting to see a vessel anchored in this position, and were not looking out for, or expecting to see, the anchor lights of a ship lying across the fairway there. In addition to this, in my opinion, and in the opinion of the Elder Brethren, the brilliant lights on the north shore in the vicinity of the collision, and the light and shadow caused by these lights on the water, would probably make it more difficult to pick up the lights of the *Corstar*.

The first question which I now have to consider is whether the *Eurymedon* was negligently navigated. The conclusion to which I have come is that the failure on the part of those in charge of the *Eurymedon* to identify the anchor lights of the *Corstar* as such in time to avoid a collision with her was partly due to the *Corstar's* unusual and improper, and therefore unexpected, position in the river, and also was partly due to the fact that those on board the *Eurymedon*, as they approached the place of collision, were not sufficiently alert to the possibility of danger ahead and did not take proper action to reduce their speed in due time. I doubt whether I have heard from the *Eurymedon* a complete account of the observations made on board her with reference to the *Corstar's* lights. The conclusion I have come to after hearing all the evidence is that those in charge of the *Eurymedon* became aware, or should have become aware, of white lights ahead which proved to be those of the *Corstar* at a distance greatly in excess of 650 feet and in ample time to avoid a collision with her, and that they did not take any action until the hull of the *Corstar* was sighted at about 650 feet because they did not realize until they saw the hull that the lights were the riding lights of a vessel at anchor athwart the fairway.

On seeing these lights, I am advised that those in charge of

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the *Eurymedon* should have realized the possibility of a ship or ships ahead the precise position of which was obscure, and should have made a reduction of speed immediately. If they had done so they could in fact have cleared the *Corstar* by passing either to the southward of her or to the northward of her. They were coming up at a speed over the ground, as I find and am advised, of at least ten knots, and were approaching a locality where visibility is known to be made more difficult by the glare of the shore lights, and they were also approaching unidentified white lights ahead. Their speed was such as to require prompt reduction on the first appearance to them of the white lights of the *Corstar* ahead.

For these reasons I find that the *Eurymedon* was guilty of negligent navigation contributing to the collision. I find that she was not guilty of any breach of good seamanship in the measures taken by her to avoid collision when once she did take action.

The second question is whether those in charge of the *Corstar* were negligent in allowing the ship to take up the position in the fairway which I have found.

In my view, and in this also I am supported by the advice of the Elder Brethren, those in charge of the *Corstar* were lacking in good seamanship in allowing her to lie athwart the river in this place and at this time in the position as found by me. The fact that the master and the chief officer of the *Corstar* have denied that their ship ever got into this position indicates what their own opinion on this point is. If they had taken any care to ascertain their position at anchor, which I think they did not do, they would have known that the vessel, under the prevailing conditions of wind and tide, would be lying athwart the fairway on the last of the flood, and at a time when vessels would be coming up and down river, and that they would be an obstruction to them as well as being in a very unusual position. There was no necessity whatever for the *Corstar* to be there, and after those in charge of her became alive to her position they moved away to a proper anchorage on the south side of the river. The *Corstar* had a very indifferent anchor watch, a man who

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apparently did not realize that the vessel was athwart the river. In my view the conduct of those in charge of the *Corstar* in lying in this position was negligent. They were behaving in such a way as to make a collision probable with vessels proceeding up or down the river, and their conduct was not caused by any necessity but merely by lack of good seamanship and failure to take ordinary precautions to avoid risk of collision.

The third issue that arises is whether, assuming the position of the *Corstar* was improper and that those in charge of her were guilty of negligence in allowing her to get in that position, such negligence contributed to the collision, or whether the principle laid down in *Cayzer* v. *Carron Co.* (1) applies. In my view that issue depends to some extent upon the question whether the negligence of the *Corstar* in taking up that position contributed to the failure of those in charge of the *Eurymedon* to take appropriate action to avoid a collision until they were too close to clear her and the *Corchester*.

If these incidents had occurred by day and those in charge of the *Eurymedon* had known that the *Corstar* was at anchor athwart the fairway in ample time to avoid her without difficulty, the fact that it was an improper place for her to lie would clearly not have made the *Corstar's* negligence one of the contributory causes of the collision. The knowledge or lack of knowledge of the *Eurymedon* as to the improper position of the *Corstar* appears to me to be a cardinal fact on this issue as to the liability of the *Corstar*. The crucial factor of such knowledge appears to explain the difference between the decisions in *The Margaret* (2) and in *The Monte Rose* (3) as Lord Birkenhead pointed out in his speech in *The Volute*. (4)

In this case those in charge of the *Eurymedon* did not appreciate the fact that the *Corstar* was at anchor until it was too late to avoid her. I have already decided that the *Eurymedon* was to blame for not taking earlier action by reducing speed, but the negligence of the *Corstar* in allowing herself to get into an improper position does seem to me to be

(1) (1884) 9 App. Cas. 873.
(2) (1881) 6 P. D. 76.
(3) [1893] P. 23.
(4) [1922] 1 A. C. 129, 137.

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wrapped up with and part of the negligence of the *Eurymedon*. To quote the words of Lord Birkenhead in *The Volute* (1): "In the ordinary plain common sense of the business" the *Corstar* "has contributed to the accident by her negligence."

I therefore find both vessels to blame. I do not see any sufficient reason for apportioning the blame otherwise than in equal degrees.

Solicitors for the plaintiffs: *Ince, Roscoe, Wilson & Glover.*

Solicitors for the defendants: *Bentleys, Stokes & Lowless, for Alsop, Stevens & Collins Robinson, Liverpool.*

(1) [1922] 1 A. C. 129, 137.

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June 23, 24, 25, 28, 29, 30; *July* 1, 9.

Shipping—Collision—Altering course in fog.

The battleship *M.* came into collision with the steamship *K.* in foggy weather. The whistle of the *K.* was heard by those on the *M.* and was judged to be 10 deg. to 15 deg. on the port bow and a long way off. The engines of the *M.* were stopped for about four minutes, during which time two or three more fog signals were heard. The ship's head fell off to starboard and the engines were then put ahead again. A few minutes later, the whistle having been heard several times on an estimated bearing of 15 deg. to 20 deg. or possibly 25 deg., the captain of the *M.*, having come to the conclusion that the *K.* was on an opposite course and would pass port to port, made further substantial alterations to starboard, as the sound of the *K.'s* whistle was getting rather close and he wanted to give her more room.

In fact, however, the *K.* was on the starboard bow of the *M.*, and the starboard wheel action on the *M.*, instead of terminating the risk of collision, brought it about. When the vessels came in sight of each other at a distance of about 500 yards the *M.* was on the starboard bow of the *K.* and the *K.* was on the port bow of the *M.* At that time the *K.*, which had not heard the *M.'s* fog syren until just as the *M.* came into view, was proceeding at about 11 knots and the *M.* at about 7 to 8 knots.

The Court *held* that the look-out on the *K.* was inefficient, since the marked deterioration in visibility shortly before the collision was not noticed, and that both vessels were to blame in respect of their speeds.

Held further, that the *M.* was also to blame for altering course, because, although there is no rule that when two vessels are approaching one another in fog the course should not be altered, a vessel is not justified in altering without reasonable grounds for concluding that the position of the other vessel is ascertained; that the only data known to those on the *M.* were that the bearing of the whistle signals of the *K.* appeared to be one or two points on the port bow and broadening slightly, but that it was only a guess as to the direction of approaching whistle signals two to four miles away with a strong head wind blowing, and the guess was in fact erroneous.

Dicta of Lord Herschell in *The Vindomora* [1891] A. C. 1, 4, and of Lord Macmillan in *Nippon Yusen Kaisha* v. *China Navigation Co.* [1935] A. C. 177, 182, referred to and applied.

ACTION OF DAMAGE.

The plaintiffs were the owners of the steamship *Kertosono*; the defendant was Captain Frederic Arthur Buckley, R.N.,

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the commanding officer of H.M.S. *Malaya*. The collision took place off the coast of Portugal in foggy weather on February 6, 1937.

R. F. Hayward K.C. and *H. G. Willmer* for the plaintiffs.

G. St. C. Pilcher K.C. and *Owen L. Bateson* for the defendant.

[The arguments were solely directed to the facts and are fully set out in the judgment.]

Cur. adv. vult.

1937. July 9. BUCKNILL J. read the following judgment: This is a cause of damage arising out of a collision between the Dutch steamship *Kertosono*, belonging to the Rotterdam-Lloyd Line, and H.M.S. *Malaya*, of which the defendant was in command.

The *Kertosono* is a steamship, fitted with geared turbine engines and one right-handed propeller, of 7323 tons gross register, 470 feet long, 62 feet beam, and at the time of the collision was on a voyage from Genoa to London with cargo.

The *Malaya* is a battleship of 31,100 tons displacement, 640 feet long, and 104 feet beam including the bulges, and is fitted with steam turbine engines and four propellers. At the time of collision the *Malaya* was on a voyage from Portsmouth to Gibraltar.

The collision occurred in the Atlantic Ocean, approximately fifty miles to the westward of Oporto, on February 6, 1937, about half-past six in the evening, and about half an hour after sunset, so that it was twilight. Each vessel was exhibiting the regulation two masthead lights and side lights. The wind was S.S.W., a strong breeze with a rough sea. The weather was foggy, and each vessel was sounding her whistle, a prolonged blast for fog at regulation intervals of a little under two minutes.

Until after the *Malaya* heard the fog signal of the *Kertosono*, the *Kertosono* and the *Malaya* were proceeding on opposite courses, the *Kertosono* being on a course of due north and the *Malaya* being on a course of due south.

When the vessels came in sight of one another the *Malaya*

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was on the starboard bow of the *Kertosono* and the *Kertosono* was on the port bow of the *Malaya*. As soon as the officer in charge of the bridge of the *Kertosono* sighted the navigation lights of the *Malaya* he went full speed astern and put his wheel hard-a-starboard, and kept on in this way until after the collision. As soon as the captain of the *Malaya* sighted the navigation lights of the *Kertosono* he went full speed astern with an emergency signal, which meant that the maximum power was to be used without regard to the safety of the engines. Immediately before the collision he ordered the engines full speed ahead and the wheel hard-a-port to try to make a glancing blow of it. Nevertheless, the vessels struck one another, each doing and receiving great damage.

The stem of the *Kertosono* struck the port side of the *Malaya* just abaft her bridge and about 250 feet abaft her stem.

[His Lordship dealt with the angle of the blow, which he found to be three and a half to four points leading aft on the *Malaya*, and continued :]

The Court has now to decide how it came about that these two large ships, proceeding on opposite courses until shortly before the collision, using powerful navigation lights and powerful steam whistles, ships which on sighting one another took the most drastic action of which they were capable to pull up, nevertheless had this disastrous collision. Counsel for each ship contended that the other was alone to blame.

I will take the case of the *Kertosono* first because her owners are the plaintiffs in this action. Her case was that she had been sounding her whistle for fog at intervals of 1½ minutes for nearly three-quarters of an hour before the collision. When the whistle was started for fog her telegraph was rung stand by, and her engines, which at full speed gave the ship about 12 knots at 78 revolutions, were reduced to about 70 to 72 revolutions. This was said by the master to reduce the speed to 10 to 10½ knots. I am advised that this reduction of six to eight revolutions would not reduce her speed more than 1 knot. The ship continued on her course of N. true at a speed, as I find, of about 11 knots. About 6.30 P.M. the master went below for a meal and the chief officer took charge

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of the bridge. The master and the chief officer said that at that time the visibility was about two miles. Shortly before the collision the look-out on the forecastle head heard a long weak blast on the starboard bow. He looked in that direction and saw the dim glow of lights. He thought the glow was some three to four points on his starboard bow and about half a mile away. He at once reported to the bridge by sounding one short blast on his horn, which was the recognized signal that he had seen something on the starboard bow. He continued to look, and he saw the deck lights getting clear and then he saw the masthead lights and red light of the *Malaya*. He estimated them to be a quarter of a mile away, or maybe more. He said that when he first went on watch at 6 P.M. he could see 1½ miles, but just before sighting the lights it got thicker and he thought that he could only see half a mile. He said that he did not hear any long blast before the weak blast, and that he did not hear any other signal from the *Malaya* at all except the one weak signal and three short blasts.

When the chief officer on the bridge of the *Kertosono* heard the report of the look-out he asked the fourth officer and the apprentice who were on the bridge with him if they had heard anything, and they said "No." He then put the engines at slow. This order is recorded in the engine-room scrap log at 6.35. The whistle was then sounded a long blast and then the engines were stopped. This order is also logged in the engine-room scrap log at 6.35. The chief officer said there was an interval of 10 to 15 seconds between the two orders. He then waited, during which time the whistle was again sounded a long blast. All of a sudden he and the others on the bridge saw many lights on the starboard bow. Every one shouted "There she is." About the same time the chief officer saw the two masthead lights and the red side light of the *Malaya*, and he ran to the telegraph. He called out to the fourth officer and the apprentice: "What lights does she show?" and they said "Red." This confirmed his own observation of a red light on the starboard bow. The chief officer estimated the lights to bear three to four points on the starboard bow and about

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three-quarters to one mile distant. The *Malaya* appeared to be crossing his course at an angle of about six points and to have considerable speed, and to give her the best chance to cross the *Kertosono's* bows he at once put the engines full speed astern and the wheel hard-a-starboard, and sounded three short blasts on the whistle. This order is logged in the scrap engine-room log at 6.36. The engines were kept reversing at full speed until the collision, and the wheel was kept hard-a-starboard.

Mr. Pilcher, on behalf of the *Malaya*, suggested that in fact those in charge of the *Kertosono* had heard the fog signals of the *Malaya* on several occasions and for at least six minutes before sighting her lights, and that they had in fact ported their wheel when they heard these whistle signals on their starboard bow, as they thought, but in fact on their port bow. He argued that the *Malaya* had an extremely powerful syren, which was being sounded at intervals of 1 min. 50 sec., and that those in charge of the *Kertosono* must have heard the fog signal of the *Malaya* at least three or four times before the vessels sighted one another. On the other hand, the wind was S.S.W. force 6, carrying the sound of the *Kertosono's* whistle to the *Malaya* and carrying the sound of the *Malaya's* syren away from the *Kertosono*. I am also advised by the Elder Brother (1) that the vagaries of audibility of atmospheric sound signals are well recognized, and instances of that often occur in connection with the work of Trinity House as a lighthouse authority.

For some minutes before the vessels sighted each other they were approaching one another at a joint speed of about 17 knots, or 1700 feet a minute.

After seeing the officers from the *Kertosono* and hearing their evidence, I accept their evidence that they did not hear the fog signal of the *Malaya* before their look-out made his report. They gave their evidence well, and I thought that it was reliable evidence. I was also impressed by the evidence of the look-out, who appeared to me to be a very honest witness. I think, however, that the estimate of the officers

(1) Owing to one of the Elder Brethren being taken ill during the course of the hearing, by consent the trial was continued before the learned judge assisted by one Elder Brother.

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that they saw the deck lights of the *Malaya* at a distance of three-quarters of a mile or a little more, and that they saw the navigation lights at about the same distance, is wrong. I think that all the circumstances point to this distance being very much less. The considerable speed of the *Kertosono* at the moment of impact, coupled with the fact that it was said that she can be pulled up dead in the water in 525 metres from full ahead at 12 knots under normal conditions, and the fact that the *Malaya* was rapidly taking her way off, also indicate that the two vessels could not have run a joint distance of three-quarters of a mile or anything like it after the engines of the *Kertosono* were reversed on sighting the navigation lights of the *Malaya*. The evidence of the look-out of the *Kertosono* gave the distance when he saw the navigation lights of the *Malaya* at about a quarter of a mile, or may be more, and those in charge of the *Malaya* also estimate the distance when they first saw the navigation lights of the *Kertosono* at a quarter of a mile. The drastic action taken by the chief officer of the *Kertosono* on sighting the *Malaya*, which at that time was crossing ahead of the *Kertosono* from starboard to port at a broad angle and, he says, at substantial speed, again indicates that he thought there was serious risk of collision owing to the proximity of the two ships so soon as he sighted the *Malaya*. I am satisfied also that there were only a few seconds interval of time between the signals of three short blasts from the *Kertosono* and the *Malaya*. I accept the evidence of the captain of the *Malaya* that the vessels were about a quarter of a mile apart when he sighted the *Kertosono* and ordered his engines full speed astern and three short blasts to be sounded.

Moreover, the evidence of the *Kertosono* is to the effect that she only altered 23 deg. to starboard before collision under hard-a-starboard wheel and engines going full astern from practically full speed ahead. The evidence indicates that she would do this in less than two minutes. The *Malaya* was also rapidly taking her way off after the vessels were in sight of one another, and, if the collision occurred in less than two minutes after sighting, it is clear the two ships were much less

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than three-quarters of a mile apart when the *Kertosono* put her engines full speed astern.

I find, therefore, that the *Kertosono* was proceeding at 11 knots in a fog in which the visibility was about 500 yards. I find, and am advised that, in the circumstances, this was an excessive speed. The *Kertosono* is therefore to blame for breach of art. 16 of the Collision Regulations, which is as follows :—

" Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions.

" A steam vessel hearing, apparently forward of her beam, the fog-signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

I have come to the conclusion that the look-out of the officers on the bridge of the *Kertosono* was inefficient because they failed to notice the marked deterioration in visibility shortly before the collision. I am advised that this deterioration could and should have been noticed if an efficient look-out had been kept on the bridge of the *Kertosono*.

I now turn to the case made on behalf of the *Malaya*. The *Malaya* had been in fog since 5.10, when the speed was reduced to 102 revolutions. According to the petometer log—which is an accurate instrument kept on the navigating bridge and is, I was told, something like the speedometer of a car—these revolutions only gave the ship a speed of 7.1 knots in the wind and sea which she was meeting instead of 9 knots which they should have given her according to the revolution table. The syren was being sounded at intervals of 1 min. 50 sec. and the ship was steering a course of 180 deg. true. At 5.10 the captain estimated the visibility in the fog to be about 600 yards, and he said that it remained much the same until the collision, sometimes falling to 400 yards. At 7.1 knots the ship would pull up with engines reversing at ordinary full speed in about 360 yards.

The collision, according to the *Malaya's* deck log, occurred

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at 6.35½. At 6.18 the captain of the *Malaya* received a report from a leading signalman, who was stationed on the navigating bridge, and whose duty it was to sound the syren of the *Malaya*, that he thought he had heard a faint syren on the port bow. He said syren, but no doubt he meant whistle. Captain Buckley, on getting this report, asked the navigating officer and the officer of the watch if they had heard it. The navigating officer said that he had not heard it. The officer of the watch said that he thought he heard it. About two minutes later—that is, about 6.20—the captain himself heard the fog signal of the vessel, which he judged to be about 10 deg. to 15 deg. on the port bow and a long way off; he at once ordered both engines to be stopped, and that was done.

The engines were kept stopped for about four minutes—that is, until about 6.24. During that time two or three more fog signals were heard from the *Kertosono*, which the captain estimated to be about 10 deg. to 20 deg. on the port bow. At 6.24 the *Malaya's* speed had dropped to 3–4 knots, and her head started to fall off to starboard. When her head had fallen off about 5 deg. to starboard the engines were put slow ahead. Slow ahead without any order as to revolutions means 44 revolutions, which should give the ship about 4 knots in ordinary weather conditions. The ship's head continued to come into the wind and to fall off slowly to starboard until it reached 190 deg. In order to get steerage way the captain then gave the order "Half ahead both engines, 66 revolutions." Under normal conditions 66 revolutions should give the ship 6 knots, but in the state of sea and wind which the *Malaya* was meeting the navigating officer said, in his evidence, that 66 revolutions would give about 3½ knots and that he thought, at the time, that it was worth trying and that it would just give steerage way. [His Lordship dealt with the transmission of this order, which owing to a mistake in the transmission resulted in the engines being put at 114 revolutions, and continued:] These revolutions under normal weather conditions would give the ship about 10 knots.

At 6.27 the starboard syren jammed and continued to blow for about a minute. The steam was shut off and the port

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syren was started immediately. The port syren is a much deeper note than the one previously used. The captain estimated that the port syren was blown for the first time about 6.28. At 6.28 the captain—who had been hearing the whistle of the *Kertosono* on several occasions, on a bearing, as he estimated, of 15 to 20 deg. or possibly 25 deg. on the port bow, not more—having come to the conclusion that the approaching ship was on a northerly course and would pass him port to port, ordered the course to be altered 20 deg. to starboard. The captain also said in his evidence that the whistle of the *Kertosono* was getting rather close and that he decided to alter course to starboard to give her more room. After the *Malaya* had swung about 10 to 15 deg. to starboard the whistle of the *Kertosono* was again heard much louder, and the captain of the *Malaya* gave orders to alter course another 20 deg. to starboard. This order was carried out and at 6.32—that is, about three and a half minutes before the collision—the *Malaya*, after a total alteration to starboard of 50 deg., was steadied on a course of 230 deg. with engines at 114 revolutions in accordance with the order half speed ahead given seven minutes before.

As soon as the *Malaya* steadied on a course of 230 deg. the whistle of the *Kertosono* was heard again very close to. It had been heard on more than one occasion while the *Malaya* was turning to starboard and broadened in conformity with the swing to starboard of the *Malaya*. The captain of the *Malaya* then ordered an increase in his speed from 66 revolutions to 102, his whole idea being, as he said, to get away from this ship which was getting closer to him in the fog. It will be noted that 102 revolutions was the speed at which the *Malaya* was proceeding before the fog signal of the *Kertosono* was sounded and which was giving the ship then a little over 7 knots. This order to increase to 102 in fact had the effect of reducing the revolutions from 114 to 102, on account of the mechanical error in the transmission of the previous orders of half speed 66 revolutions to which I have referred. About 90 sec. after the order 102 revolutions was given another long blast was heard from the *Kertosono* and about the same time

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her masthead lights, and then the green light and her hull, appeared in the fog distant about 500 yards and bearing 40 deg. on the port bow. The *Malaya* was then estimated to be making about 7 to 8 knots through the water and reducing speed slightly from 114 to 102 revolutions, and was heading 230 deg. true. The *Kertosono* appeared to be going about 12 knots and to be on a course at right angles to the course of the *Malaya*. About the same time as she came in sight the *Kertosono* sounded three short blasts. The engines of the *Malaya* were immediately put full speed astern and the emergency signal was given, and three short blasts were sounded. The *Kertosono* then appeared to turn under starboard wheel and to reduce her speed. There was some evidence from the *Malaya* that very shortly after first sighting the *Kertosono* she appeared to be turning to port before she turned to starboard. The *Malaya* soon lost practically all her headway and just before the collision the captain of the *Malaya* gave the order full ahead and hard-a-port to try to make a glancing blow of it, but the *Malaya* had not sufficient headway to operate on the rudder and she remained on her heading of 230 deg. until after the collision.

Comparing the case made on behalf of the *Malaya* with the case made on behalf of the *Kertosono* there appear to be only two points in which the two stories have any substantial discrepancy. There are, of course, discrepancies as to speeds and bearings and headings of the two vessels during the short time they were visible to each other ; but when one remembers that the ships sighted one another probably not more than 90 sec. before the collision, these discrepancies are not surprising.

The two points on which there are substantial discrepancies between the cases are (1.) as to the range of visibility at the time of sighting, and (2.) whether the *Kertosono* was on the port bow or on the starboard bow of the *Malaya* when the *Malaya* first heard the *Kertosono's* whistle, and when the *Malaya* first allowed her head to fall off to starboard and then altered course to starboard.

I have already dealt with the first discrepancy as to the

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range of visibility and have accepted the *Malaya's* evidence on that point.

The second discrepancy, whether the *Kertosono* was on the port bow or the starboard bow of the *Malaya* when the *Malaya* first heard her whistle, and later altered her heading, has raised the most difficult issue in the case. There is no reason to doubt that the two vessels were on opposite courses at that time and, therefore, if the *Kertosono* was on the port bow of the *Malaya*, as the captain and the other witnesses of the *Malaya* say she must have been from the estimate they formed as to the bearing of her fog signals, then the *Kertosono* must have substantially ported her wheel in order to keep pace with the substantial starboarding of the *Malaya*.

Arguments were put forward on behalf of the *Malaya* that the *Kertosono* must have altered course to port, and arguments were put forward on behalf of the *Kertosono* why they did not do so.

One argument on behalf of the *Malaya* was based on the angle of the blow. It was said that if the Court (1.) accepts the heading of the *Malaya* at the time of collision as 230 deg., (2.) accepts the agreed angle of penetration at its deepest point at 57 deg., (3.) accepts that angle as being substantially the same as the initial angle of impact, and (4.) finds that the *Kertosono* was on a course of 360 deg. up to the time of sighting, as she says she was, then it follows that the *Kertosono* must have ported. But it seems to me that I cannot accept all these data as established. Take the angle of the blow. I prefer the evidence of Mr. Flannery on this point that the initial angle was three and a half to four points. Then, again, I am advised that the *Kertosono* in that high following wind and sea might yaw as much as a point to port before she started her swing to starboard under reversed engines.

It was said that Commander Stevens, on board the *Malaya*, an experienced observer, fixed the course of the *Kertosono* when her loom came in sight as being about 85 deg. to the course of the *Malaya* instead of being at an angle of 50 deg., which would fit in with the *Kertosono's* case. I do not see any reason to doubt the bona fides of the evidence of Commander

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Stevens or of all those who were called for the *Malaya*. I believe that they wished to say what they considered was strictly true, but it seems to me that the circumstances were such that any observation of the actual heading of the *Kertosono* in the fog at the moment of sighting probably would not be so precise as to form the basis of my judgment on this question of porting by the *Kertosono* and to convict the witnesses of the *Kertosono* of perjury.

On behalf of the *Kertosono* there is to my mind something in the point which Mr. Hayward made that if the *Kertosono's* master and chief officer and the fourth officer were all minded to concoct a false story they would have produced something more commendable as to their speed than the case they have produced. Again, I doubt if they would dare to deny all hearing of the earlier whistle signals of the *Malaya* when there would probably be many of the crew who must have heard them and might say so. An inquiry as to the collision was held by the Dutch authorities in Holland.

The necessary porting by the *Kertosono* in order to fit into the original position of port to port, as estimated by those on board the *Malaya*, involves the rejection by the Court of the evidence of the *Kertosono* as to their navigation for a substantial time, certainly some minutes, preceding the sighting of the vessels, and the Court must find that they have concocted a series of lies as to their not hearing the fog signals of the *Malaya* and as to their keeping on their course. It also involves them in the foolish manœuvre of porting their wheel to a vessel whose whistle they are hearing on their port bow, although they may have thought it was on their starboard bow, and a very serious breach of art. 16 in not stopping on hearing a fog signal forward of their beam and in keeping on at highly excessive speed.

I have already expressed my view as to the value of the evidence of the witnesses from the *Kertosono*. I attach more weight to their positive evidence on oath, which I believed, than to the estimates of the bearing of the *Kertosono's* fog signals from the *Malaya*, about which there may be a genuine mistake in the circumstances of this case. In this connection

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I quote the words of Sir Gorell Barnes when giving the judgment of the Privy Council in *The Chinkiang* (1) : " It is notorious that it is a matter of the very greatest difficulty to make out the direction and distance of a whistle heard in a fog, and that it is almost impossible to rely with certainty on being able to determine the precise bearing and distance of a fog signal when it is heard, and it is clear that in the present case the indications given by the *Chinkiang* to the *Alacrity* were not such as to show to those on board the *Alacrity* unequivocally and distinctly what was the position of the *Chinkiang*, and that the commander of the *Alacrity* was not justified, from what he heard, in assuming that the *Chinkiang* was going the same way as the *Alacrity*. The engines of the *Alacrity* ought to have been stopped until it could be, with certainty, ascertained what the position of the *Chinkiang* was, and what she was doing. . . . .Their Lordships desire to state that the advice which they have received from the assessors who have assisted them upon the appeals is entirely in accordance with the conclusions at which their Lordships have arrived."

For this reason I resolve the discrepancy as to the bearing of the *Kertosono* from the *Malaya* when the *Malaya* first heard her whistle in favour of the *Kertosono*, and I find as a fact that until the *Malaya* first altered her course to starboard the *Kertosono* was in fact on the starboard bow of the *Malaya*.

I now have to decide whether the navigation of the *Malaya* was in accordance with the King's Regulation coinciding with art. 16 of the Collision Regulations, which I have already read. It was contended on behalf of the *Malaya* that the position of the *Kertosono* was ascertained as being on the port bow and that therefore she did navigate with caution in altering her course to starboard. I have already found that those on the *Malaya* were mistaken and that their estimate of the bearing of the *Kertosono* was wrong, and they therefore did not in fact ascertain the true position of the *Kertosono* before altering course to starboard.

Art. 16 does not state in terms that a vessel in fog shall

(1) [1908] A. C. 251, 259.

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not alter her course on hearing the fog signal of another vessel forward of the beam the position of which is not ascertained. She must stop her engines and thereafter navigate with caution until danger of collision is over. Each case must be decided on its own peculiar facts.

Lord Herschell pointed out in his speech in *The Vindomora* (1) that there is no hard and fast rule at sea that the course must not be altered. " I should be very sorry " he said, " to say anything to indicate any dissent from the view that where two vessels are approaching one another in a fog, without any sufficient indication to justify action, neither vessel would be justified in altering her course. I think the proper steps to be taken in such a case would be for each vessel to keep the course on which she was proceeding. But, although I entirely agree that that is a good general rule to lay down, yet that rule must nevertheless be interpreted in each case according to the circumstances of that case. It is impossible to lay down an abstract rule of that description which shall be applicable to all circumstances, to all parts of the seas, and to all positions of vessels. I do not understand the Court of Appeal to have thrown any doubt upon the suggestion that it is the general rule, and that in each particular case you must look to see what the circumstances were, and inquire in each particular case, Were there circumstances existing which justified the manœuvre executed, or which prevented that manœuvre from being a wrong manœuvre ? "

I have, therefore, to apply this test — Were there circumstances existing which justified the manœuvre of starboard wheel executed by the *Malaya* ? The justification put forward by the defendant was, as I have said, that he concluded that the *Kertosono* was on his port bow and on an opposite course, but was approaching him rather close, and that he altered course to starboard to give the *Kertosono* more room. The question for my decision is whether the defendant was justified in drawing this conclusion. In other words, whether the facts as known to him warranted his conclusion that he had sufficiently ascertained

(1) [1891] A. C. 1, 4.

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the position of the *Kertosono* to justify the manœuvre of starboard wheel.

The judgment of the Privy Council in *Nippon Yusen Kaisha* v. *China Navigation Co., Ld.* (1), throws some light on the question when a captain is justified in drawing a conclusion as to the position of another ship approaching him in fog. In that case the question was whether a vessel coming up a narrow channel on her own starboard side of midchannel, and hearing a fog signal of a steamship on her port bow, was justified in assuming that the steamship was proceeding down the channel on her own proper side, that her position was therefore ascertained, that art. 16 of the Collision Regulations did not apply, and that she was not bound to stop her engines. The Privy Council held that the steamship was to blame for not stopping her engines. Lord Macmillan, in delivering the judgment of the Board, said (1): "The position of the *Toyooka Maru* was not, in their Lordships' opinion, 'ascertained' within the meaning of the Regulation. It was inferred, not ascertained, and as it turned out the inference was wrong. The data on which an inference is founded may be so conclusive as to raise the inference to the level of a certainty, but in the present case the only data were that the fog signals were heard on the *Kiangsu's* port bow, that outward bound vessels keep to the south side of the channel, and that it was improbable that a vessel would be crossing the fairway in a fog. An inference based on these data was not in their Lordships' opinion an ascertainment on which it was justifiable to disregard the precaution enjoined by Regulation 16. In order that the position of a vessel may be ascertained by another vessel within the meaning of the Regulation she must be known by that other vessel to be in such a position that both vessels can safely proceed without risk of collision." (Lord Macmillan then referred to the judgment of Sir Gorell Barnes P. in *The Aras.* (2))

In *The Aras* (2) Sir Gorell Barnes found the *Oakmore* to blame in the following circumstances: She was proceeding

(1) [1935] A. C. 177, 182. (2) [1907] P. 28, 34, 35.

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down the English Channel in fog at slow speed and sounding her fog signal. She heard a fog signal on her port bow, of which the captain took a bearing by compass and made it out to be a point or a little more on the port bow. He stopped his engines and the whistle was heard again about three times and broadened out to about 25–28 deg. on the port bow. He then went on dead slow on his former course and the whistle continued to broaden on his port bow until it got about four points or a little more on his port bow. Then the *Aras* was sighted on his port bow crossing his course and the collision happened. Sir Gorell Barnes held the *Oakmore* to blame. In the course of his judgment he said (1): "The only other matter to consider . . . . is the possibility that a man in the position of the master of the *Oakmore* might have been mistaken in the view he took of the bearing and progress of the vessel, and the consideration of what his position would be then. I think it is exactly the same, because it is so well known—so absolutely well known—that it is impossible to rely upon the direction of whistles in a fog, that I do not think any man is justified in relying with certainty upon what he hears when the whistle is fine on the bows like this was undoubtedly, and is not justified in thinking it is broadening unless he can make sure of it. That is the view I entertain very strongly, because if it is well established that the direction is an uncertainty, it is no use trying to rely upon it as a certainty by saying you looked at the compass."

These cases are directed to the question whether there was justification for failing to obey the peremptory order to stop the engines, and they must not be pressed against the defendant on the question whether there was justification for altering course to starboard, about which there is no specific direction in the rule. But they are helpful, if I am right in my view that an alteration to starboard, as in this case, can only be justified if there were reasonable grounds for concluding that the *Kertosono's* position was ascertained. In my judgment, apart from my findings of fact as to the then position of the *Kertosono*, the position was not sufficiently

(1) [1907] P. 28, 35.

ascertained by the defendant to justify his starboard wheel. The only data known to the defendant were that the bearings of the whistle signals of the *Kertosono* appeared to him to be about one to two points and broadening slightly on the port bow, but this was really a guess as to the direction of approaching whistle signals two to four miles away, with a strong head wind blowing. The data seem to me, and I am so advised by the Elder Brother, to be far from being so conclusive as to raise the inference to the level of a certainty. In my judgment, those on board the *Malaya*, on hearing the fog signals, were not justified in concluding that the *Kertosono* was in such a position that the *Malaya* could proceed ahead without risk of collision if the *Malaya* altered course to starboard. The fact that such a substantial alteration as 50 deg. was made by the *Malaya* as the *Kertosono* was approaching indicates the uneasy state of the captain's mind as to the position of the two ships and his desire to get away from the *Kertosono*. Unfortunately he went the wrong way, and instead of terminating the risk of collision brought it about. The defendant would have avoided a collision had he kept his heading by giving his engines a touch ahead from time to time and felt his way along until he had ascertained the *Kertosono's* position.

If my findings of fact had been that the *Kertosono* wrongly ported her wheel, in my judgment the alteration of course to starboard by the *Malaya* would, in the circumstances, have been also wrong. If the *Kertosono* did port her wheel about the time when the *Malaya* starboarded, there was no reason why she should do so, except for the same reason that the *Malaya* starboarded her wheel—namely, to get further away from the *Malaya*, which those in charge of the *Kertosono* guessed was approaching her fine on the starboard bow and in such a position as to involve risk of collision. The officers of the *Kertosono* were experienced seamen and did not desire a collision. One would get the position therefore in which the officers of the *Malaya* altered course to starboard on an inference which proves to be right, and the officers of the *Kertosono* altered course to port on an inference which proves to be

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wrong, and both vessels head for each other under starboard and port wheels at speed in dense fog. When one contemplates this as the *Malaya's* explanation of the collision one realizes how incautious it is to alter course and to go on at speed when another unseen vessel is approaching in dense fog.

The danger and imprudence of altering course in such circumstances as these have been often explained in this Court as thereby defeating the main object of careful navigation of vessels approaching one another in fog, which is that each ship should take her way off until she has ascertained the position of the other with sufficient certainty to enable each to pass clear of the other in safety.

In my judgment, and on the advice of the Elder Brother, whose opinion entirely coincides with mine, the defendant committed a breach of good seamanship and of the King's Regulations, which coincides with art. 16 of the Collision Regulations, in that he altered the course of the *Malaya* to starboard before the position of the *Kertosono* was in fact ascertained.

In my judgment, and I am so advised by the Elder Brother, the navigation of the *Malaya* was also imprudent and wrong in proceeding at a speed of 114 revolutions at a time when the *Kertosono's* whistle was getting closer and the fog was such that the visibility was only 500 yards. The defendant may not be personally responsible for the error of transmission of his order of " Half ahead, 66 revolutions " into " Half ahead, 114 revolutions," but it was admitted by Mr. Pilcher that for the purpose of this case the navigation of the *Malaya* herself must be considered, and the Court must assume that the engines were deliberately set at 114 revolutions. The *Malaya* in fact reached a speed of 7 to 8 knots at a most critical time, and this speed, I am advised and find, was much too high to be regarded as cautious navigation. It is difficult to understand how it came about that this considerable increase of speed over the speed of $3\frac{1}{2}$ knots anticipated with an order of 66 revolutions—an increase which must have been recorded by and visible on the petometer log on the navigating bridge—was not noticed by any one on that bridge. In the conditions

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of sea and wind which the *Malaya* was meeting 66 revolutions was not expected to give more than 3½ knots, as I have already stated, and yet the petometer log must have been slowly mounting from about 3 knots to between 7 and 8 knots, or more than twice the expected speed.

I do not find that the failure to stop, when two persons on the bridge of the *Malaya* heard the fog signal of the *Kertosono*, was negligence which contributed to the collision, although it may have been a technical breach of art. 16 of the Collision Regulations. Neither do I find that the initial speed of 7 knots was excessive. If it was it did not contribute to the collision.

Mr. Hayward also made the point that it was unseamanlike to order the engines full speed astern, emergency order, when the lights of the *Kertosono* were sighted. He argued that the *Malaya* should have continued ahead and tried to cross the bows of the *Kertosono* when she heard three short blasts from the *Kertosono*, and knew that the *Kertosono* was taking her way off and trying to pass under the *Malaya's* stern. The result of the emergency order was to lose steam and the use of the engines and the use of the helm. In my view, this action of the *Malaya* may well be described as action taken in the agony of collision. I am also advised that, in the circumstances, the action of the *Malaya* was not unseamanlike because there was no certainty that the collision would be avoided even if she had gone ahead. Reduction of headway has, at any rate, this certain advantage, that the damage done will be thereby reduced if a collision does occur.

I therefore find both vessels to blame for this collision, and it only remains for the Court to consider whether the circumstances are such that it is possible to establish different degrees of fault.

The fault of the *Kertosono* is serious, because she was going at a greatly excessive speed in the fog actually prevailing, and it was her speed which was largely responsible for the heavy damage done in the collision. There is this extenuation of her fault that the fog, as I think, got much worse very shortly before the collision, and I am advised that in the dusk this

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might be missed if the look-out was not as sharp as it should be on the bridge in foggy weather. Her fault, therefore, may be said to be due to a failure to appreciate the true situation, and not to any gross negligence on her part.

The faults of the *Malaya* are also serious. If the *Malaya* had kept her course there would, in my judgment, have been no collision, because the vessels would have passed one another all clear starboard to starboard. The alteration of the *Malaya's* course to starboard, and her unjustifiable increase of speed, also brought about the collision. There is this extenuation of her fault, that the starboarding was due to a failure to appreciate the true situation and to a desire to give the approaching *Kertosono* a wide berth, and the increase of speed was made in furtherance of that purpose. The navigation of the *Malaya* was not due to any gross negligence on her part.

In these circumstances, I am unable to see clearly any reason why different degrees of blame should be established, and I find both vessels equally to blame.

Solicitors for the plaintiffs : *Waltons & Co.*
Solicitor for the defendant : *The Treasury Solicitor.*

E. C. M. T.

CONSISTORY COURT OF LONDON. 1937

In re ST. DUNSTAN'S, STEPNEY. *June* 5, 19.

Ecclesiastical law—Local government—Disused burial ground—Faculty to erect buildings thereon under private Act—Prohibition in earlier public Act—Validity of private Act—Disused Burial Grounds Act, 1884 (47 & 48 *Vict. c.* 72), *s.* 3—*London County Council (General Powers) Act*, 1935 (25 & 26 *Geo.* 5, *c. xxxiii.*), *ss.* 41, 42.

By s. 3 of the Disused Burial Grounds Act, 1884, it is made unlawful to erect buildings on a disused burial ground. By s. 42 of the London County Council (General Powers) Act, 1935, a private Act, a local authority may erect (inter alia) buildings on any open space, and by s. 41 open space includes a disused burial ground under the control of the local authority.

A local authority proposed to erect buildings on a disused burial ground, to be used as a playground and gymnasium for children, and applied for a faculty so to do under s. 11 of the Open Spaces Act, 1906 :—

Held, that with respect to this burial ground the public Act of 1884 was abrogated by the private Act of 1935, and that the latter must prevail, and a faculty was decreed.

PETITION for a faculty.

The London County Council and the rector and churchwardens of the parish of St. Dunstan's, Stepney, petitioned for a faculty for the conversion of part of the disused burial ground of St. Dunstan's into an open-air gymnasium and playground for children.

Until the year 1890 the ground was maintained by the Metropolitan Public Gardens Association and had been used as a playground for children. In that year the association gave notice that it could no longer maintain it, and since that year the ground had been maintained by the London County Council as an open space. No faculty had been granted.

The present petition asked that the management and upkeep of the ground should be transferred to the Council, and the Council now proposed to erect thereon gymnastic apparatus and two shelters, one for boys and one for girls, with accommodation for attendants, lavatories and other accommodation. No organized games, such as football and cricket, were to be allowed.

Evidence was called to show that the use of the ground as

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proposed would greatly benefit the children of the parish, and it was stated that there were now no signs of burial left on the ground.

The petition was not opposed.

At the hearing the Chancellor raised the question whether the public general Act, the Disused Burial Grounds Act, 1884, which by s. 3 (1) prohibits the erection of such buildings on disused burial grounds, could be repealed by a private Act, the London County Council (General Powers) Act, 1935 (2) (which permits such erection), in respect of a particular locality. Without calling for argument he adjourned the hearing in order to consider the point.

(1) Disused Burial Grounds Act, 1884 (47 & 48 Vict. c. 72), s. 3: "After the passing of this Act it shall not be lawful to erect any buildings upon any disused burial ground, except for the purpose of enlarging a church, chapel, meeting house, or other places of worship."

(2) London County Council (General Powers) Act, 1935 (25 & 26 Geo. 5, c. xxxiii.), s. 41: "For the purposes of this Part [Part V. 'Open Spaces'] of this Act the following expressions have the respective meanings hereby assigned to them:—'burial ground' includes any churchyard cemetery or other ground whether consecrated or not which has been at any time set apart for the purpose of interment;

'disused burial ground' means any burial ground which is no longer used for interments whether or not the ground has been partially or wholly closed for burials under the provisions of a statute or order in council;

'local authority' means the Council or a borough council as the case may be; and

'open space' includes any . . . . disused burial ground under the control and management of the local authority in relation to whom the expression is used."

Sect. 42: "A local authority may in any open space (*a*) provide and maintain . . . . (iii.) golf courses and grounds tracks lawns courts and greens for any game or recreation or for athletics; (iv.) gymnasia . . . . (*f*) provide and maintain swings . . . . (*g*) erect and maintain for the purposes of or in connection with any of the foregoing paragraphs (*a*) to (*f*) or for or in connection with any other purpose relating to the open space such buildings or structures as they consider necessary or desirable including ornamental buildings shelters bandstands pavilions dressing rooms refreshment rooms reading rooms buildings for the accommodation of keepers and other persons employed in connection with the open space sheds or other structures for the protection or storage of plants and gardening implements urinals waterclosets lavatories and other conveniences."

Sect. 52 incorporates s. 11 of the Open Spaces Act, 1906 (6 Edw. 7, c. 25), which renders a faculty necessary for the present purpose.

J. S. Franey for the petitioners.

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Cur. adv. vult.

1937. June 19. THE CHANCELLOR (MR. F. H. L. ERRINGTON) read the following judgment: This is an application by the London County Council and the rector and churchwardens of the parish of St. Dunstan's, Stepney, for a faculty to enable the London County Council to fence off and utilize a portion of the disused churchyard of that parish as a playground and gymnasium for children under fourteen. No graves will be affected. From 1886 to 1890 the churchyard was laid out and generally kept in order by the Metropolitan Public Gardens Association. Since that time, with the consent, at least implied, of the rector and churchwardens, and no doubt to the advantage of all concerned, the churchyard has been maintained by the Council as an open space.

Their position, however, has never been regularized either by faculty or by agreement under ss. 6 and 11 of the Open Spaces Act, 1906. This lapse from the highest standard of municipal virtue by an authority generally so punctilious in these matters is now to be remedied. An agreement has been or will be made under s. 6 of that Act formally transferring to the Council this open space. And in accordance with s. 11 of the same Act they are now seeking liberty to exercise powers of management enabling a portion of the churchyard to be used for the above purposes.

This, however, is not all. Organized games are not contemplated. But it is desired to provide for the children swings, a sandpit, a gymnasium and a shelter to contain storage, and attendants' rooms, lavatories and other conveniences. The shelter will be built of brick on a concrete foundation, and will be a building within s. 3 of the Disused Burial Grounds Act, 1884, which, except for enlarging a place of public worship, forbids building on a disused burial ground. It is urged, however, on behalf of the Council that in London the Act of 1884 is abrogated to the extent here required by a local and private Act, the London County Council (General Powers) Act, 1935.

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That a public Act, passed to prevent a growing evil and to preserve the integrity of our churchyards, should be virtually repealed in respect of a particular locality by a private Act seemed somewhat startling, and I have had therefore to consider carefully its provisions. Part V. of the private Act deals with open spaces, which include disused burial grounds under the control and management of the local authority. By s. 42 a local authority may in any open space maintain open air baths and swimming pools, places for dancing, golf courses and gymnasia. They may, further, provide entertainments, including concerts, dramatic performances, cinematograph exhibitions and pageants, though the attractiveness of the programme is somewhat diluted by the fact that under s. 48, sub-s. 1 (*a*), no performance of a stage play or variety entertainment shall be given otherwise than by amateurs. They may further provide and maintain swings, platforms, screens, and other apparatus ; and under sub-s. 1 (*g*) of s. 42 they may erect and maintain for any purpose relating to the open space such buildings or structures as they may consider desirable, including buildings of the nature now in question. Sect. 52 of the Act, however, incorporates s. 11 of the Open Spaces Act, 1906, so that in the case of a disused burial ground a faculty is necessary before a local authority can exercise these, in many respects, incongruous powers.

The question remains whether in such cases this court has ceased to be bound by the Act of 1884 to which in the local Act there is no express reference. According to Byles J. in *Shrewsbury* (*Earl of*) v. *Scott* (1) : " The Legislature, in passing a private Act, is as omnipotent as in passing a public Act. . . . . Were the statute a tyrant, yet its decree, being clear, is irresistible." I have come to the conclusion on the language that the local Act must prevail.

Sect. 51, sub-s. 1, enacts that, subject to certain exceptions, which do not apply : " . . . . The powers conferred on a local authority by this Part of this Act may be exercised notwithstanding the provisions of any other Act or of any scheme made

(1) (1859) 6 C. B. (N. S.) 1, 219.

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thereunder." The Act of 1884 can, therefore, only be set up to be knocked down and by an Act which, in this respect, attains no publicity. I find the discretionary jurisdiction of this court extended to questions whether a disused burial ground shall be used for all or any of the purposes contained in s. 42 and, although an open space, be curtailed by fences and buildings. In the present case the purposes go no further than those already allowed by the Open Spaces Act, 1906, and the buildings are of small importance. Indeed the application is clearly in the interest of the physical health of these children.

While reaching this conclusion and realizing that in this particular Act the jurisdiction of this court over consecrated ground is respected, I am rather concerned by the lack of publicity in a matter of public interest which this occasion brings to light. Although the local Act partially repealed the Act of 1884 and largely modified the Act of 1906, no ripple disturbed the legislative calm. The earnest student conning his statutes would find no mention of these two Acts in the Table of Acts repealed or amended by legislation of 1935. To intercept them he must scan the index to the local and private Acts for a revealing note. Nor is this the only action affecting these open spaces which goes on virtually behind the scenes. I doubt whether the public are fully aware of the modern tendency to nibble away disused churchyards under private Acts and provisional orders confirmed by Parliament. They are too tempting a prey, as the compensation for their compulsory purchase is necessarily small. The incumbent has neither the time nor the money to spend in opposing, and in default of opposition such Acts or orders pass unnoticed, leaving in their trail the knotty problem whether the land taken remains consecrated ground subject only to the statutory user.

Our country churchyards are, I think, the most beautiful in Europe, and our town churchyards, often thanks to the local authority, now the best maintained. It is owing to their sacred character that they remained so long intact. This gives them no protection now ; in fact it cheapens them. If disused,

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they are placed in the same category as other open spaces. It would seem desirable that some discrimination should be made, especially where the main reason for including the churchyard in a compulsory area is financial.

The consistory courts have long been recognized as the proper guardians of these sacred spaces, and with extended powers they might, I think, be trusted to have due regard for public interests. At present their vitality is being sapped by these purely local measures. Even their jurisdiction to direct how in cases of compulsory purchase the dead and their memorials shall be disposed of consistently with the wishes of their families, or as to those forgotten, with due respect to their remains, is in local Acts excluded by what is called a model clause, rendered immutable by the quasi-vested interests which have clustered round it, enabling the local authorities themselves to deal with the whole matter subject to certain perfunctory references to the Bishop dissociated from his Court.

If, as I believe to be the case, private bills which affect any Government department are sent to that department for scrutiny and observation, it might be suggested that where they affect ecclesiastical interests they should be sent to the Ecclesiastical Commissioners or some other Church body. The question of publicity is a more difficult one, but if local and private Acts are allowed even locally to modify or repeal public Acts it would seem desirable that the fact of those public Acts no longer affecting, or differently affecting, certain localities should have the same publicity as the Acts themselves.

With regard to the present proceedings, the effect of this local Act is, I think, beneficial in so far as the interests of the children of the neighbourhood are concerned, although "the space" ceases in the strict sense of the word to be "open." I am therefore prepared to grant a faculty enabling the Council to exercise in the disused churchyard all or any of the powers of management with respect to similar open spaces conferred on local authorities by the Act of 1906 and so as to permit the playing of games and sports by children under fourteen within the area hereinafter referred to. Also, under the powers

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conferred by the London County Council (General Powers) Act, 1935, to provide and maintain within a portion of the churchyard a gymnasium enclosed within a protective fence and fitted with modern equipment for children together with a sandpit and a shelter with storage room, attendants' rooms, lavatories, and other conveniences in accordance with the drawings, plans, and elevations shown on the document marked " D " annexed to the petition. Provided that the use of the churchyard shall be subject to the by-laws of the Council and the use of the said restricted portion thereof to the Council's regulations for children's gymnasia. And I give liberty to apply.

Before the faculty issues an agreement must be entered into between the rector and the Council under s. 6 of the Open Spaces Act, 1906, giving the Council the control and management of the ground. This preliminary step is necessary having regard to the definition of " open space " contained in s. 41 of the local Act. (1)

Solicitor for petitioners: *Solicitor to the London County Council.*

(1) See note (2) ante, p. 200.

W. L. L. B.

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June 21.

WALKER *v.* WALKER AND WALKER.

Divorce—Practice—Costs—Co-respondent—Reconciliation of petitioner and respondent—Motion to rescind decree—Fresh order as to costs —Service on co-respondent.

The petitioner and the respondent in a suit for divorce having become reconciled after the decree nisi, the husband, the petitioner, moved for the rescission of the decree nisi and for a fresh order condemning the co-respondent in the taxed costs of the petition. The Court ordered that the decree should be rescinded, the petition dismissed and the co-respondent condemned in the costs of the petition as taxed without including the costs of the hearing of the motion, the order to be subject to the filing of an affidavit of the service of it on the co-respondent.

DIVORCE MOTION.

Application by the husband, petitioner in the suit, for the rescission of the decree nisi and for an order against the co-respondent for the payment of the taxed costs of the petition. On November 25, 1936, a decree nisi was pronounced dissolving the marriage of William Stanley Thomas Walker and Rachel Jessica Dixon Walker on the ground of the adultery of the latter with Frederick John Walker, the brother of the petitioner. The co-respondent, F. J. Walker, was condemned by the decree nisi in the costs of the suit. On February 1, 1937, an order was made that the costs as taxed should be paid into Court by the co-respondent within seven days of the order. This order had not been complied with and the period of six months from the decree nisi having expired the petitioner and the respondent became reconciled and awaited the rescission of the decree nisi before returning to cohabitation. The petitioner now moved for the rescission of the decree nisi and that the co-respondent be ordered to pay to the petitioner his taxed costs of the suit. The application was supported by an affidavit of the petitioner of the foregoing facts and the King's Proctor, having been served with notice of the motion and a copy of the affidavit, replied that he had no objection to the rescission of the decree and the dismissal of the petition. The co-respondent was served with the

notice of motion and a copy of the affidavit in support and there was an affidavit of service upon him.

S. E. Karminski in support of the motion. I ask that there should be a substantive order for costs against the co-respondent, as the existing order against him may be ineffective having regard to the rescission of the decree nisi of which the order for costs is a part. I rely on *Quartermaine* v. *Quartermaine and Glenister.* (1)

The co-respondent did not appear.

THE PRESIDENT (SIR BOYD MERRIMAN). I wish it to be understood that this order can properly be made only where (as has been done here) the co-respondent has been served with notice of motion and with a copy of the affidavit in support of the motion. A copy of the fresh order must also be served on the co-respondent and an affidavit of such service filed. The decree nisi will be rescinded, the petition dismissed, and the co-respondent condemned in the costs of the petitioner as taxed, but not including the costs of the day.

Solicitors : *Boxall & Boxall, for Cliffords, Derby.*

(1) [1911] P. 180. In the case of *Quartermaine* v. *Quartermaine and Glenister* no notice of the application had been served on the co-respondent.

R. M. M.

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July 16.

PLUNKETT *v.* PLUNKETT.

Husband and wife—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict. c.* 39), *ss.* 5 (*c*), 7—*Maintenance order—Undertaking by parents of husband to pay lump sum in payment of arrears and reduced weekly payments under order—Dissolution of marriage of husband and wife—Continuance in force of order—Application by husband for further reduction—Undertaking material to assessment of means of husband to pay pending decision of competent Court as to its enforceability—Enforcement of undertaking.*

On an application by a husband for a reduction of the amount of a maintenance order pursuant to the Summary Jurisdiction Act, 1895, ss. 5 (*c*), 7, the parents of the husband undertook to pay a lump sum in settlement of arrears under the order and to pay maintenance at a reduced rate. An order was drawn up in these terms, the parents giving their undertaking to the summary jurisdiction court. On a subsequent application by the husband for further reduction on the grounds of reduced means and that a decree absolute of divorce had been pronounced dissolving the marriage of the husband and wife, the court of summary jurisdiction found that there was no reason to justify a further alteration of the order, although it was stated that the parents of the husband had refused to pay.

On appeal it was held by the Divisional Court that these circumstances did not suffice to justify a reduction. Since *Bragg* v. *Bragg* [1925] P. 20 it is plain that dissolution of marriage does not have the effect of discharging an order for maintenance. If and when in such a case it is decided by a court of competent jurisdiction that the undertaking of third parties is not enforceable and that there are no means of compelling them to put the husband in funds to pay the maintenance ordered, it is open to the husband to allege before the court of summary jurisdiction that there is fresh evidence entitling him to a reduction of the order, but so long as the undertaking is not shown to be unenforceable its existence is plainly a circumstance that the court of summary jurisdiction can take into account in assessing the means of the husband to pay.

Appeal from a court of summary jurisdiction.

The parties were married in 1926 and there was one child of the marriage, a son born March 29, 1929. On February 6, 1931, on a summons alleging persistent cruelty, a court of summary jurisdiction granted the wife a separation order with 30*s.* per week maintenance and the custody of the child. By a subsequent order made on October 14, 1935, the former order was varied. The husband on this occasion applied for a

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reduction on the ground of his altered means. At this date there were considerable arrears under the former order. The parents of the husband undertook to pay 50*l.* in settlement of the arrears and 15*s.* per week reduced maintenance. An order was drawn up in these terms, the parents giving their undertaking to the court. On April 2, 1937, the husband applied to the court of summary jurisdiction to further vary the original order as varied by the order of October 14, 1935, on the grounds of his reduced means and that a decree absolute of divorce had been pronounced dissolving the marriage of the parties since the order of October 14, 1935. A divorce decree absolute had been pronounced at the instance of the wife on the ground of the adultery of the husband, who had now remarried. This latter application for further variation was refused. The court of summary jurisdiction found that there was no reason to justify an alteration of the order, although it was stated that the parents of the husband had refused to pay.

The husband appealed to the Divisional Court. The appeal was out of time.

William Latey for the appellant referred to *Bragg* v. *Bragg*. (1)

The respondent wife did not appear.

THE PRESIDENT (SIR BOYD MERRIMAN). In this case we grant leave to appeal out of time.

Having heard the appeal, as things are at present, speaking for myself, I am satisfied there is no ground for interfering with the justices' order.

The material facts are : In 1931 there was an order by consent against the husband for 30*s.* a week maintenance. That, in turn, was varied on October 14, 1935, when the parents of the husband undertook to pay 50*l.* arrears in respect of a much larger sum and pay for the future 15*s.* a week provided the 30*s.* was reduced to that sum. On the face of it—and I say no more than this—that appears to be an enforceable undertaking against the parents given manifestly for good

(1) [1925] P. 20.

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consideration and entered into before a court of competent jurisdiction. I agree that the order is somewhat unfortunately worded, but I have no doubt that it is in fact an order upon the husband, though it refers to the undertaking given by the parents. It has, in fact, always been so treated, and the present application to review and the present appeal against the refusal to review are based upon the assumption that this is an order upon the husband. At present the only two circumstances which have been put forward to justify a reduction of the sum are, that the marriage has been dissolved since October, 1935, and that the parents are refusing to pay. It is quite plain under the decision of this Court in *Bragg* v. *Bragg* (1), which has been consistently followed, that the mere dissolution of marriage does not of itself operate to discharge a maintenance order. The question whether that change of status between the spouses does or does not vacate the parents' undertaking is a matter which will fall to be decided by any Court before whom it is sought to enforce this undertaking. I say no more than this, that the magistrates at the present moment are not obliged to act merely upon a statement that the parents are refusing to pay. If and when it has been decided that this undertaking of the parents is not enforceable and that there is no means of making them put the husband in funds to pay this 15*s*. a week, it will be open to the husband to allege before the justices that there is fresh evidence upon which he may be entitled, if the rest of the facts justify him in doing so, to ask them to reduce the order; but so long as the undertaking is not shown to be unenforceable it is quite plainly a circumstance which the justices are entitled to take into account in assessing the husband's means to pay. If there is an undertaking by the parents to provide the sum which the justices have ordered the husband to pay for the purpose of the wife's maintenance, it is perfectly plain that that is evidence of means to pay. So long as there is not shown to be any change of circumstances in this respect it seems to me that the justices were perfectly right in refusing to vary this order, and this appeal must be dismissed.

(1) [1925] P. 20.

LANGTON J. I agree, and would even go a little further. The order of October 14, 1935, proceeded entirely upon an undertaking by the parents of the complainant to pay a weekly sum of 15*s*. It has not been shown, indeed I cannot see that any evidence was adduced before the magistrates to show, that that undertaking was not still enforceable. Unless and until it is shown that the order is unenforceable it is difficult to see what change of circumstances there could be which would justify the order being varied or set aside. In any event I very much doubt whether, at the present stage of the proceedings, this order still being in existence and the undertaking not having been shown to be unenforceable, this Court has any right to make an order directing the magistrates to take any other course than the one they have taken. When the matter is cleared up as to whether the order is enforceable or not, then and then only will the time come when this matter will have to be considered. I agree that the appeal must be dismissed.

Solicitors: *Pickering, Kenyon & Co., for Clutterbuck, Trevenen & Mawson, Carlisle.*

R. M. M.

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July 21.

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Shipping—Port authority—Raising sunken barge—Obstruction to navigation—Negligence—Counterclaim for damages—Statutory duty or authority—Private obligation—Limitation of time for bringing counterclaim—Public Authorities Protection Act, 1893 (56 & 57 *Vict. c.* 61), *s.* 1—*Harbours, Docks and Piers Clauses Act,* 1847 (10 & 11 *Vict. c.* 27), *s.* 56.

The defendants' sailing barge sank and became an obstruction to navigation in the channel of the River Orwell within the limits of the Port of Ipswich, of which the plaintiffs were the port and harbour authority. The defendants wrote to the plaintiffs saying that they presumed the plaintiffs would take steps to raise the barge and that they (the defendants) would pay the reasonable expenses. The plaintiffs replied that they hoped to raise the wreck of the barge on the next spring tides, and they did so and moved the barge nearer to the shore. They negligently omitted, however, to put a light on the barge, and she was run into by a passing vessel, dragged further into the channel again, and damaged. The defendants refused to pay the expenses of raising the barge a second time and, more than six months afterwards, counterclaimed in respect of the damage the barge had received.

The plaintiffs alleged that in raising the barge they were acting in the exercise of their statutory duty under s. 56 of the Harbours, Docks and Piers Clauses Act, 1847, and/or other public duties as the authority responsible for the conservation of the navigation of the river, and that the counterclaim, not having been brought within six months of the act complained of, was barred under s. 1 of the Public Authorities Protection Act, 1893:—

Held, that the plaintiffs were under no obligation to raise the barge, which they could have blown up or got some one else to raise; that they raised her in pursuance of a contract made between the parties; that the negligent act complained of was not done in the direct execution of any statutory or public duty; and that the provisions of s. 1 of the Public Authorities Protection Act did not apply.

CLAIM for expenses: COUNTERCLAIM for damages due to negligence.

The plaintiffs, the Ipswich Dock Commission, who were the port and harbour authority for the port of Ipswich, claimed 294*l.* 11*s.* 2*d.* against Samuel West, Ld., the owners of the sailing barge *Ronald West.*

On November 5, 1935, the *Ronald West,* while lying at anchor in the River Orwell, within the port of Ipswich, was run

into by the *S.S. Crossbill* and sank in the navigable channel, where she became an obstruction to navigation. The plaintiffs alleged that they were obliged to provide a lighted buoy to mark the position of the wreck, and, acting in pursuance of the powers conferred by s. 56 of the Harbours, Docks and Piers Clauses Act, 1847, proceeded, as they were entitled to do, to raise and remove the wreck, and that they thereby incurred expenses amounting to 544*l.* 11*s.* 2*d.*, which the defendants were liable to repay. Further, or in the alternative, the plaintiffs alleged that by letter dated November 9, 1935, the defendants requested the plaintiffs to raise the *Ronald West* and undertook to pay the reasonable expenses of so doing, and that the plaintiffs complied with the request by raising and removing the wreck and thereby incurred the expenses. On March 26, 1936, the defendants paid 250*l.*, as the plaintiffs alleged, "on account of" the expenses, and the plaintiffs contended that there remained due and owing the sum of 294*l.* 11*s.* 2*d.*

According to the defence and counterclaim delivered on February 22, 1937, and, as amended, on May 11, 1937, the wreck of the *Ronald West* having been raised by the plaintiffs on or about November 29, 1935, was placed by them in a position in which at certain states of the tide vessels were in the habit of navigating. The wreck was wrongfully and negligently left by the plaintiffs in such position, unmarked either by a lighted buoy or otherwise. In these circumstances, during the night of November 30–December 1, 1935, the wreck was struck by the passing *S.S. Oxbird*, causing further serious damage and forcing the wreck back into the deep water channel. The plaintiffs subsequently again raised the *Ronald West*, and for the expenses of so doing the defendants alleged that they were not liable, and that the reasonable expenses of lighting, raising and removing the wreck were not more than 250*l.*, which sum the defendants tendered on March 28, 1936, before action brought.

By way of counterclaim the defendants said that they had suffered damage by reason of the negligence of the plaintiffs as set out in the defence, and they further alleged that by

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letters of November 9 and 12, 1935, passing between the plaintiffs and the defendants and by the subsequent steps taken by the plaintiffs, the plaintiffs voluntarily and without obligation contracted to raise the wreck, and that it was an express and/or implied term of the contract that the plaintiffs should use all reasonable and necessary care in so doing. In leaving the wreck of the *Ronald West* unlighted the plaintiffs were guilty of a breach of contract and/or neglect of a private duty and the defendants thereby suffered damage.

By their reply and defence to the counterclaim the plaintiffs denied that the letters constituted an agreement ; they alleged that they were at all material times acting in the execution of their statutory and/or other public duties as the authority responsible for the conservation of the navigation of the River Orwell within the port of Ipswich, and that no action or proceeding having been commenced by the defendants within six months after the act, neglect or default complained of they would rely on s. 1 of the Public Authorities Protection Act, 1893. (1)

His Lordship having found that the plaintiffs were negligent, heard argument on the question whether the Act of 1893 afforded a defence to the counterclaim.

J. V. Naisby for the plaintiffs. Harbour authorities, acting in pursuance of their public duties, are entitled to the protection of the Public Authorities Protection Act : *The Ydun*. (2) The defendants' complaint is that no light was put on the partly raised wreck ; as the authority concerned with the safe navigation of the river, it was the plaintiffs' duty to see that the wreck

(1) Sect. 1 : " Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect :

" (*a*) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of . . . ."

(2) [1899] P. 236.

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was lighted and, if it was an obstruction to navigation, remove it. If (contrary to the plaintiffs' contention) the letters passing between the parties amounted to a contract, it was not a private contract or outside the plaintiffs' duties as the harbour authority, and the plaintiffs acted solely in the execution of their statutory and/or public obligations. The defendants' " action or proceeding " was not instituted until the delivery of the counterclaim some fifteen months after the act complained of, and, therefore, the counterclaim does not lie.

R. F. Hayward K.C. and *H. L. Holman* for the defendants and counterclaimants. The barge was raised under a contract; the plaintiffs themselves plead that the defendants requested them to raise the barge and that they, the plaintiffs, complied with that request. There was no statutory obligation on the plaintiffs to raise the barge; s. 56 of the Harbours, Docks and Piers Clauses Act, 1847, says that a harbour authority " may " remove a wreck, etc., not " must " remove. They chose to deal with a specific chattel belonging to the defendants and owed the defendants a private duty, having partially raised the wreck, to take care of it and put a light on it. A public authority may do something which it is empowered to do under its statute, but which, nevertheless, is not a public duty. When the act done is merely incidental to the exercise of a public duty it is outside the provisions of the Public Authorities Protection Act: *Bradford Corporation* v. *Myers* (1), *Sharpington* v. *Fulham Guardians*. (2) See also Annual Practice, 1937, note to O. 65, r. 1, p. 1434. [Reference was also made to *The " Crystal "* (3).]

Naisby replied.

BUCKNILL J. In this case the plaintiffs are the Ipswich Dock Commission, and the defendants are Samuel West, Ld. The action was originally started by the plaintiffs, who are the port and harbour authority for the port of Ipswich. I have not seen a copy of their statute, but I will assume, for the purposes of my judgment, that the Act does incorporate the

(1) [1916] 1 A. C. 242, 252.
(2) [1904] 2 Ch. 449.
(3) [1894] A. C. 508.

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Harbours, Docks and Piers Clauses Act of 1847, s. 56 of which lays it down that "The harbour master may remove any wreck or other obstruction to the harbour, dock or pier, or the approaches to the same, and also any floating timber which impedes the navigation thereof, and the expense of removing any such wreck, obstruction, or floating timber, shall be repaid by the owner of the same."

The defendants are the owners of a vessel called the *Ronald West*. On November 5, 1935, the *Ronald West*, while lying at anchor in the River Orwell, and within the jurisdiction of the plaintiffs as the port and harbour authority, was sunk. From November 5 the plaintiffs lighted the ship. On November 9 Samuel West, Ld., wrote to the plaintiffs: "Dear Sirs,—With reference to our barge now lying sunk within your jurisdiction, we regret to say we have been wholly unable to obtain a reasonable contract to raise her, although we should like to have done this. Presumably you will be taking steps to raise her with a view to clearing an obstruction. We shall be pleased to assist in any way we can with such arrangements as you make and, on removal of the barge to a safe place, we will certainly arrange to see any reasonable account of yours properly dealt with, and, provided the barge is not too badly damaged, we shall be prepared to take her over from a safe place."

On November 12 the plaintiffs replied as follows: "S.b. *Ronald West*—I duly received your letter of the 9th inst. and in reply have to inform you that at the present time we have no craft available for raising the above barge. We hope, however, to be in a position to start operations in about a fortnight and to lift the vessel during the week ending the 30th inst. during the spring tides. Every care will be taken in the lifting, but as we shall have to place craft over the wreck we cannot be responsible for any further damage which may accrue during the process of raising. I thank you for your assurance that our reasonable expenses will be met."

Following on these letters the plaintiffs on November 20 started to raise the wreck, and they got her towards the bank. On November 29 they took away the lighted mooring buoy—a

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wreck buoy with a green light which they had hired from Trinity House—under the unfortunate idea that they could save Samuel West, Ld., seven shillings a day, the cost of the hire. On December 7 they moved the wreck a little farther in towards the bank, and left it unlighted, and, on the following morning, a steamship coming up, without any negligence on her part, ran into the wreck and damaged it.

I need not refer to the various claims and counterclaims which have been made in the case except to the particular counterclaim made by the owners of the *Ronald West*. On February 27, 1937, they claimed against the plaintiffs damages by reason of the negligence of the plaintiffs whereby this collision occurred and their craft was damaged. To that claim of the owners of the *Ronald West* the defence is put in (inter alia) that the plaintiffs are protected by s. 1 of the Public Authorities Protection Act, 1893, the claim being made more than six months after the neglect complained of, and that, therefore, the claim fails.

I have to decide that question. The case which seems to me to throw light upon the point is *Bradford Corporation* v. *Myers* (1), and I start with Lord Haldane's judgment where he said, in reference to the Public Authorities Protection Act : " My Lords, in the case of such a restriction of ordinary rights I think that the words used must not have more read into them than they express or of necessity imply, and I do not think that they can be properly extended so as to embrace an act which is not done in direct pursuance of the provisions of the statute or in the direct execution of the duty or authority." A little farther on he referred to a judgment of Farwell J. in *Sharpington* v. *Fulham Guardians*. (2) Lord Haldane then said : " For it seems to me that the language of s. 1 does not extend to an act which is done merely incidentally and in the sense that it is the direct result, not of the public duty or authority as such, but of some contract which it may be that such duty or authority put it into the power of a public body to make, but which it need not have made at all. If this be so it is fatal to the contention of the appellants in the present case."

(1) [1916] 1 A. C. 242, 251, 252. (2) [1904] 2 Ch. 449.

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In my view, the two letters which I have read constitute a contract made between the plaintiffs and Samuel West, Ld. I think it is clear that, quite apart from such powers as they have under the Act to which I have referred, the plaintiffs could have sued Samuel West, Ld., for the cost of raising the barge. I do not think that they were bound to raise her ; they might have blown her up ; they might have stood by and allowed somebody else to raise her, as was contemplated at first by Samuel West, Ld. I think that they did raise her under this contract. That being so, it seems to me that the case comes under the words of Lord Haldane in *Bradford Corporation* v. *Myers* (1), to which I have referred. I think that this is an Act which does restrict the rights of an individual when suing somebody else who has done him a wrong, and one must read the words of the Act strictly. If I find, as I do in this case, that the negligent act done by the plaintiffs was not done in direct pursuance of the provisions of the statute, or in the direct execution of their duty or authority, but was, in fact, done under a contract made between them and Samuel West, Ld., I think that the provisions of the Act do not apply. Therefore I hold on that point that the defence to the counterclaim of Samuel West, Ld., fails.

There will be judgment for the defendants on their counterclaim, with costs, and a reference to the registrar to assess the damages. The question of the claim, and whether the tender of 250*l.* is sufficient, will be adjourned until the figures have been assessed by the registrar.

Solicitors for the plaintiffs : *Waltons & Co.*

Solicitors for the defendants : *Holman, Fenwick & Willan.*

(1) [1916] 1 A. C. 242.

E. C. M. T.

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